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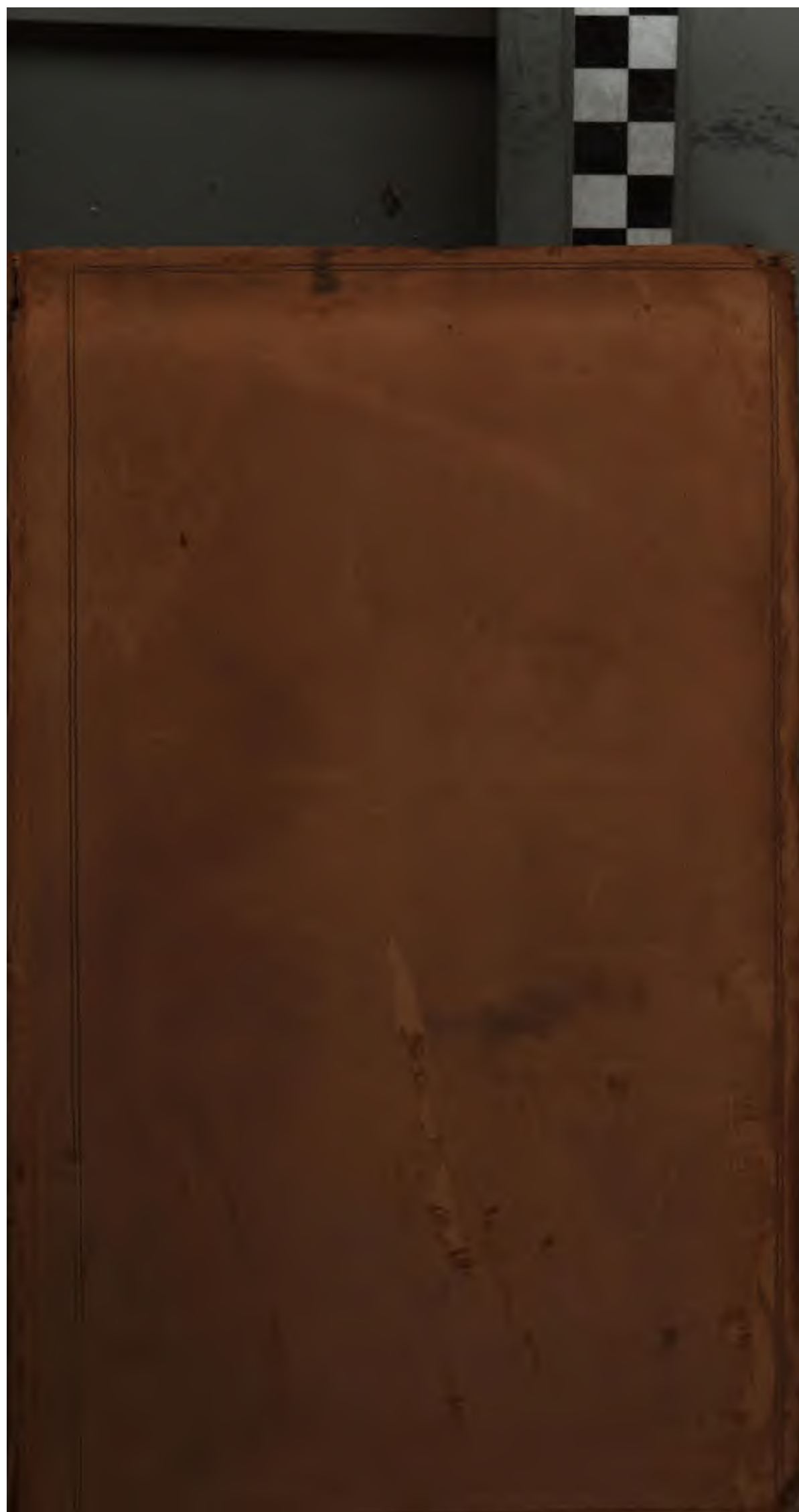
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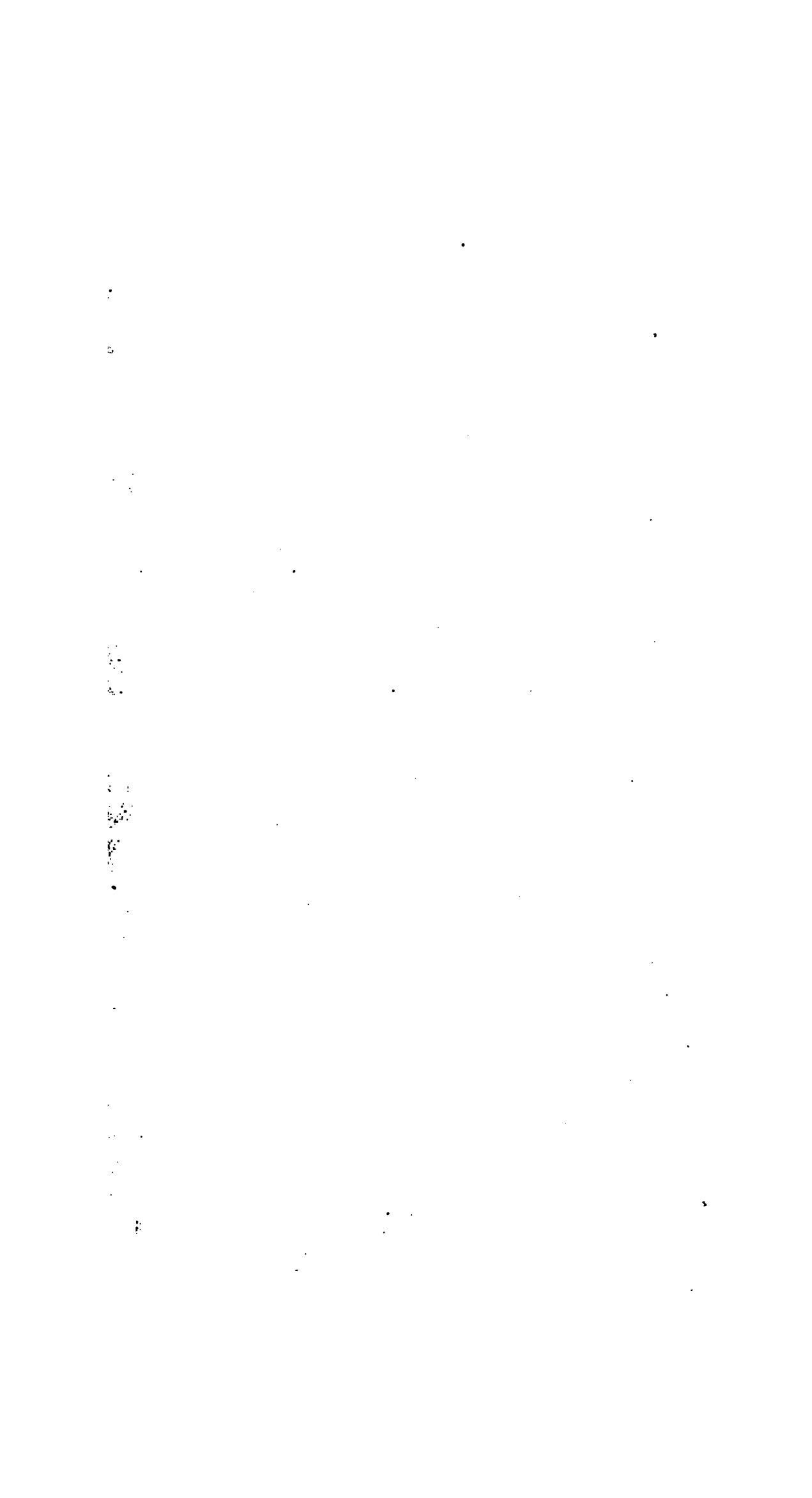
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JUDGMENTS

DELIVERED IN THE

COURTS OF THE UNITED STATES FOR THE
DISTRICT OF MASSACHUSETTS.

JUDGMENTS

DELIVERED IN THE

COURTS OF THE UNITED STATES

FOR THE

• DISTRICT OF MASSACHUSETTS.

BY

JOHN LOWELL, LL.D.,

DISTRICT JUDGE.



BOSTON:

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1872.

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CORRECTIONS AND ADDITIONS.

Page 96, head-note to case of *The Georgia*, for "June, 1863," read "June, 1864."

Page 99, line 31, end of second paragraph, for "statesmen" read "statesman."

Page 168, additional note to the case of *The Java*: It is understood that the supreme court have reversed the decision of the circuit court in this case, and sustained the decree of the district court.

Page 446, additional note to the case of *Great Western Insurance Co. v. Thwing*: It is understood that the supreme court have reversed the decision of the circuit court in this case.

DECISIONS

IN THE

COURTS OF THE UNITED STATES

FOR THE

DISTRICT OF MASSACHUSETTS.

BY JOHN LOWELL, DISTRICT JUDGE.

DISTRICT COURT.

THE ZEALAND.

MAY, 1865.

A derelict was found at sea and towed for two days by a fishing schooner, with some difficulty and injury to the schooner, into a port of safety, and was libelled for salvage, and remained unclaimed for nearly a year, and there was evidence that the owner was informed of the proceedings and refused to appear, and the proceeds of sale were only \$206. The whole net proceeds were decreed to the salvors.

SALVAGE. — The fishing schooner Pescador, of Gloucester, of ninety-one tons burden, and having a crew of nine men, all told, fell in with this derelict near the edge of George's Banks on the 27th of March, 1864, and undertook to tow her to Gloucester, a distance of about one hundred and eighty miles, abandoning her own voyage. The wind and weather were not favorable, and on the second day, in trying to make the harbor, the Pescador broke her main-boom. The libel was pending nearly a year, and no claimant appearing, was heard *ex parte*. Besides the facts above recited, it was proved that the proceeds of sale, after deducting the marshal's costs, were \$206; and that the owner of the derelict was known, and had been informed of the proceedings, and did not choose to appear.

C. P. Thompson, for the libellants. We ask for as much as the court ever allows. There is a case in which five-sixths of the value was awarded.

The Ida L. Howard.

LOWELL, J. There is authority for giving the whole net proceeds in a case of this peculiar character. *The Rutland*, 3 Irish Jurist, 283; *The Castletown*, 5 ib. 379.

It is not only in the Irish courts that we find a precedent for decreeing the whole property as a reward for saving the remainder. It has been done in England; *The William Hamilton*, 3 Hagg. 168 n.; and that case is in fact the leading authority on this point, and is cited without disapproval by many learned authors.

I have not met with an American case which goes so far, but neither have I seen one in which there was occasion to rule upon the matter. In England, if no claimant appeared, the question would be between the salvors and the crown; but here there is evidence of a distinct refusal by the owner to claim. If he had appeared, I should not feel at liberty to make the order; yet as the salvors might well ask for remuneration for the actual damage suffered by their schooner, in the name of expenses, there would be very little left to divide; and this, probably, was the motive operating with the owner in refusing to claim. His abandonment must be held to enure to the benefit of the libellants.

Decree that the money in the registry, after payment of costs, be transferred to the libellants for their salvage and expenses.

THE IDA L. HOWARD.

MAY, 1865.

Salvors of a derelict vessel have the right to retain possession until the salvage service is completed.

But if their own means are inadequate they are bound to accept additional assistance, if offered.

If, in such case, a steamer furnished by underwriters is offered the salvors free of charge, they cannot found a claim to increased compensation upon their acceptance and use of the steamer.

The use and consumption by salvors, in the course of their service, and for their necessary subsistence, of stores found on board a derelict, is proper, although they could have brought stores of their own on board without great inconvenience.

Salvage of derelict property is compensated by similar rules as obtain in respect to property not derelict. If the abandoned vessel lies in or near a frequented harbor, the chief ground of enhancement of salvage by reason of her being derelict is that the finders have all the responsibility of the enterprise without aid from the master.

The Ida L. Howard.

Where numerous salvors of a derelict vessel and cargo, stranded in Boston harbor, labored diligently during more than one day, and furnished lighters, and aided materially in the salvage, which, however, would not probably have been successful but for the services of a steamer and some other appliances furnished them by the underwriters, they were allowed \$2000 and expenses as salvage on a value of \$12,000 saved.

SALVAGE.— On the 15th of February, 1865, the schooner *Ida L. Howard*, of about one hundred and sixteen tons burden, owned in Portland, and bound on a voyage thence to Philadelphia, with a cargo consisting chiefly of barley in bulk, attempted to make the harbor of Boston to avoid an impending storm. At about eleven o'clock at night, while holding her course, as her master supposed, towards the harbor, she struck on what are known as the Egg Rocks, near Boston Light. After staying by her for some two hours, and about an hour before high water, the sea making fast, and the schooner being in imminent danger of going to pieces, the master and crew all left her in their only boat, taking with them most of their clothes and personal effects, and such other light articles of value as they had on board, and finding no safe landing at any nearer place, there being much ice floating in the bay, rowed to Boston, where they arrived at about eight o'clock the next morning, the 16th.

In the mean time the vessel had driven off or over the ledge on which she had originally struck, and had gone over to Point Allerton, about a mile distant, in a southerly direction, where she was stranded, on a rocky beach, going on apparently at or near high water, and was found by the libellants between seven and eight o'clock in the morning, hard aground, and somewhat heeled over to starboard. The libellants, thirty-six in number, were all inhabitants of Hull, and several of them experienced wreckers. They waded on board, through water and floating ice about three feet deep at the bow, the tide being ebb and within about an hour of low tide, and found that the schooner had all sails set, of which the main topsail and flying jib were considerably torn; that she was about one-third full of water, and that both pumps were frozen up. The libellants immediately took energetic and skilful measures for the relief of the vessel. They hauled down and made fast the sails, and thawed out the pumps. They sent to Hull, about a mile and a half distant, for an anchor, which was brought round

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by a small schooner belonging to the libellants. This anchor and two belonging to the Howard were carried out through the surf, with a good deal of difficulty and some risk, and hauled taut; and a steam tug-boat, the Dayspring, was telegraphed for to Boston, and came down, arriving some time before high water.

At high tide, in the afternoon, by heaving on the anchors, and with the aid of the tug, the libellants got the stern of the vessel round directly to seaward, and tried to push her off the beach, but failed, the tug parting two hawsers, and the schooner moving but slightly. During the morning the wind had moderated, and again increased, blowing a whole sail breeze from the eastward, and the sea was very rough. In the afternoon the wind hauled to the northward, and moderated again, and so continued until the vessel was got off the next afternoon, and the sea gradually went down.

In the forenoon, and some hours before this attempt was made to get the schooner off, her master came down, and being unable, as he testified, to go on board by reason of the surf, had a conversation with some of the libellants, who were in the little schooner Laurel, which had brought the anchor round from Hull. He told them who he was, inquired into the condition of the vessel, said he had not come to interfere with them, but that they were to go on and get the vessel off, and should be well paid if they succeeded, and asked where they should convey her if they got her afloat.

The master then went back to Boston. A few of the libellants remained on board all night. Others came back with their schooner Thetis, after the tide had risen that night, and began lightening the vessel by taking off the deck-load, which consisted of eight wooden hay-presses, in pieces — a full deck-load. This work was continued by the Thetis, assisted afterwards by the schooner Malcom, belonging to the libellants, until the whole deck-load had been got off, which was not long before high tide in the afternoon. The libellants also carried out a fourth anchor. At an hour or an hour and a half before high tide, the Dayspring came down again from Boston, at the request of the libellants, to aid in the second attempt to pull the schooner off the beach.

At some time on the 16th of February, the underwriters of the cargo heard of the disaster, and engaged Mr. Tower, who is agent of the New York and Boston underwriters, and a commis-

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sioner of wrecks under the laws of Massachusetts, to look after the matter. The president of the office gave Mr. Tower a letter giving him charge, as he expressed it. He engaged the steam-tug Starbuck, and a schooner with cables, &c., often employed by the underwriters, and early the next morning went down in the tug, and going as near the wreck as was prudent, had a conversation with one of the leading salvors, master of the Thetis, found that the barley was in bulk, and that the salvors had no bags, and went back to Boston for shovels and bags, and some other tools and implements which he thought necessary, and which he procured, and left Boston again some time after noon, and, in going down, overtook the master of the Howard with a mate and one man rowing towards the wreck, took them in tow and arrived there soon after the Dayspring, that is, an hour or more before high water. How many men came with Mr. Tower did not appear. From this point there was some little difference in the testimony, and a good deal in the legal inferences sought to be drawn from it on either side.

Either the master or Mr. Tower, or both, told the salvors that they had come with additional means and assistance, and demanded the right to discharge a part of the cargo, and to take the direction of affairs. The libellants refused to give up the charge of the vessel and to receive the assistance, except on terms. They offered to hire Mr. Tower and his men, which offer was indignantly refused. They at first declared that the tug Starbuck should not assist; but soon after, and before high tide, made a bargain with her master for her assistance upon terms agreed between them. The Starbuck and Dayspring made fast to the wreck, the libellants heaved on the anchors, and the vessel was hauled off the beach after an hour of severe labor. The tugs took the saved schooner, the salvors' schooners Thetis and Malcom with the hay-presses on board, and the underwriters' schooner Kate in tow, and all proceeded together to Boston, where the Howard was safely moored and delivered to her master. An anchor and some chain cable, which was thrown over at the last moment, to lighten the vessel, were recovered by the libellants, and delivered on board of her the next day, and on that day, the parties being unable to agree on the amount of salvage, this libel was filed.

The *Ida L. Howard*.

J. C. Park & J. M. F. Howard, for the libellants, insisted, that the schooner was derelict, and that the salvors were entitled to a moiety of the value saved.

F. C. Loring & J. Lathrop, for the claimants.

LOWELL, J. Salvors, strictly so called, are persons who undertake to save property in peril, at the request of the owners, or of their agent, the master; and if any definite contract is made, in any case, freely and fairly, they are bound by its terms. But if no bargain is made, still the salvors are under the direction and control of the master, and may be discharged by him, with or without good cause, upon being compensated for what they have already done, or without such immediate compensation, if their lien is not endangered. Finders, on the other hand, take possession, primarily by right of discovery, and cannot be dispossessed afterwards by the owner or master. Again, finders being in possession under no contract, may, I suppose, abandon their enterprise at any time before other persons, either salvors or owners, who might have saved the property, if they had not, have intervened, or been ready to intervene; in other words, if their exertions have not diminished the chances of ultimate safety; and this without waiting for any such danger to life, or apparent hopelessness of the enterprise, as would alone justify salvors in such abandonment. On the other hand, both salvors and finders are under an implied obligation to use good faith, honesty, skill and energy in what they do undertake. Their services are, at the present day, compensated upon principles substantially similar, and diminished or forfeited alike by want of due care and skill, or by positive malfeasance. I cannot, therefore, assent to the argument for the libellants, that if this is a case of derelict goods, the salvage compensation should be a moiety, or some definite proportion approaching a moiety of the value of the thing saved. *Post v. Jones*, 19 How. 150. The compensation, when we come to it, must be given on the general principles of salvage, with this element of merit, that the salvors have not, in a case of derelict or *quasi* derelict property, and had not in this case, the advantage and relief of the oversight and direction of the master of the vessel, who is presumed to be the most competent person, and the person most deeply interested in the proper direction of affairs, in such a calamity; and as oversight and

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responsibility are more highly paid than mere labor, their compensation should be enhanced accordingly.

Where an abandoned vessel is found floating at large on the high seas, there is, of course, the consideration which, I apprehend, is at the foundation of much that has been said on the subject of derelict, that so far as any beneficial property of the owner is concerned, it is in the utmost peril; nearly as much so when it happens to turn out tolerably seaworthy, as if it were in very bad order, because, in any event, the chance of recovery must be very slight. But this does not apply to a wreck in the harbor of a town like Boston, where vessels are constantly passing and succor is always to be had. A fact which depends upon intent is often difficult to establish or to disprove. In this case, the master left his vessel to save the lives of the persons on board, at a time and under circumstances which render it doubtful whether he knew precisely where he was or could estimate very accurately his peril; he took with him, apparently, whatever was most valuable and portable. He went to Boston and noted a protest which has not been produced; he went down again, without his officers or crew, so far as appears, and without any means or intention to aid in the rescue of the valuable property which had been intrusted to him; he was afraid to go on board his vessel, for the surf; he told the salvors to go on and get the vessel off, and went back to Boston. It is disputed, and is almost the only fact that is disputed, whether he told the salvors that he thought he should go home to Portland; three witnesses swear that he did. He denies it. However this may be, it is clear that he might as well have been in Portland, for all the aid he gave by counsel or by act in saving the vessel and cargo at that time. His part of the affair appears to have been that of a disinterested spectator; surely a very singular position for the master of a vessel who had not abandoned her. There are two cases in which the abandonment was made under circumstances like those of the case at bar, and where the master's right was much stronger than in this, in which it was held that the salvors had a right to treat the property as derelict; *The Sarah Bell*, 4 Notes of Cases, 147; *The John Gilpin*, Olcott, 77.

Taking all the facts of the abandonment, and of the conduct of the master afterwards, I think the salvor's right of possession on the second day was superior to his.

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It is said, that, whatever may have been the rights of the master, Mr. Tower, the commissioner of wrecks, had, by a statute of this State, the right of possession, whenever he chose to assert it; and I was urged to give a construction to this statute, which is said to be understood somewhat differently by the wreckers and the commissioner respectively. The present case, however, calls for no decision on this point, because Mr. Tower's evidence is very distinct, that he made no demand and assumed no authority as commissioner of wrecks. His office was well known to the wreckers, but for some reason, no doubt sufficient, he did not choose to assert it. He is agent of the underwriters as well as commissioner, and in the former character had a letter from the underwriters of the cargo which had not been abandoned, "giving him charge" of the property; but it is very clear, that neither those underwriters nor their agent could take charge of this wreck against the wishes of the salvors. But it is not, perhaps, necessary to rest the decision of this point solely on this ground. It is by no means entirely clear to my mind that the salvors understood that the demand of possession was made distinctly by the master, as master. He was there with Mr. Tower, and accidentally, so far as time is concerned; for, if Mr. Tower had not taken him in tow, he could hardly have arrived much before high water. Mr. Tower conducted the negotiations, and by his character, and by his having charge of the second tug and other appliances, though not by his official position, was the principal person; he showed the salvors his letter, he says, and reasoned with them. I am not clear that the salvors did not understand the demand, which they refused, to be that of the agent of the underwriters. The master's chief complaint, on this head, in his deposition, is, that they would not obey the agent; the agent, on the stand, appears to consider the master the person most aggrieved.

But whatever may have been the right of possession and control, the salvors were bound to accept the assistance offered them, if it was necessary to the ultimate success of the enterprise, or would hasten that result in any material degree, as by saving a tide or the like. Upon this point, the libellants appear to have misunderstood their position. It was their duty to accept necessary assistance, even if offered by strangers; and they would

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reject it at their peril. If they could make no bargain for their aid, they must accept it without a bargain, and leave the owner or the court to adjust the compensation. Here it is evident that some part of the assistance offered by Mr. Tower was necessary. The event has shown that without the services of the Starbuck the vessel could not have been saved, at that tide, unless a part of her barley had been discharged, which the salvors could not do themselves, and refused to let Mr. Tower do. It is plain, on the evidence, that it required all the power of both tugs, working under a high pressure of steam, and even the jettison of an anchor and chain, to get her off, at the last moment that the tide remained sufficiently favorable. I cannot therefore justify the refusal of the libellants to accept her services. But they had an opportunity of repentance, and improved it; they engaged the services of the Starbuck, after a short delay, and by so doing saved the tide and their salvage. I am not curious to inquire whether their hesitation lasted for five minutes or for twenty-five; as the owners did not suffer by it, neither should the salvors. But, on the other hand, I do not think that the compensation of the salvors should be increased by their hiring the Starbuck, whose services were offered them, without charge by the underwriters. They were bound to accept those services, as I have already said, even if offered by strangers, leaving the salvage to be settled afterwards; but here was no question of salvage. Persons interested in the property tendered the gratuitous services of the tug. How then are the salvors to wait until they can make a bargain for what they were offered without price, and then adduce those services as something added to their own merit and "procured" by them, as they say in their libel? The Starbuck was not procured by them; and the question of their compensation must stand as if they had accepted her at once, as a salvor, if such had been her character, or as the underwriters' vessel, if such she were. In other words, the underwriters are entitled to the benefit of their own exertions and foresight; and the salvors are not to be paid for a foresight which they did not exhibit.

It remains to fix the compensation justly due to the libellants, a matter much more difficult than to ascertain either the facts or the law of this case, because it is one which has and can have no

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fixed scale of prices, and of which the principles, though well understood, are very general and difficult to reduce to computations. I take off nothing for the alleged embezzlement of clothing and provisions ; because, resting solely on the evidence of the master, and that given some time after his first deposition was taken, and weighed by all the facts and evidence, I do not think the allegation is made out, except to this extent, that the salvors did make use of some of the vessel's stores and provisions, without plunder or waste. I am asked to say that such use is unlawful ; and a brief note of a case before Judge Marvin, and found in his excellent work on wreck and salvage, § 105, is relied on. I have no doubt that decision was right ; but as the case is not stated at all, it cannot be compared with this or any other case, and must be taken to have been decided upon its own circumstances, or upon some rule found to be necessary for the Florida wreckers, who form a distinct class or trade. It cannot be maintained, as a general proposition, that salvors are bound to find their own supplies, pending the salvage service. On the contrary, supplies so furnished, if of sufficient importance to be considered at all, form one of the items of the expenses which are to be refunded to the salvors. In this very case, if the libellants, some of whom staid by the vessel, continuously for two days, had brought their supplies from Hull, and carried them out to the vessel through the surf which the master was afraid to encounter, that fact would have been a proper one for compensation. It is rather for the advantage of the vessel that her stores were available for the purpose, and her owners can adjust the cost with any others who may be responsible to contribute, as readily in the one case as in the other.

I am satisfied, not only by the opinions of the libellants and their neighbors, but from a consideration of the state of the vessel with all her sails set, her position on the rocky beach, the amount and direction of the wind and surf, and the damage that she actually sustained, that she was in imminent danger of bilging when found by the libellants ; and I think her safety from that peril is owing to their exertions. If she had bilged, the vessel and cargo would have been much more damaged than they were, if not destroyed. Besides this, the exertions of the salvors in pumping

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the vessel constantly, or as much as was necessary, in carrying out anchors through a surf which the master dared not enter, in removing the deck-load by night and day on board their own vessels furnished for the purpose, hauling on the anchors, and engaging the Dayspring, were energetic, meritorious, skilful, and well-directed services, and performed for the most part without the aid or advice of the master or any one else. These services have secured to the owners and underwriters a great part or all of a property valued at twelve thousand dollars ; and though not completely successful, and not likely to have been completely successful at that time without the aid of a second tug, yet they were essential, and the principal services in the salvage, and were continued for a long time, with some hazard in carrying out the anchors, with some exposure in wading on board, and by a large number of persons, most of whom, certainly, took an active and useful part.

As they are not entitled to credit for the Starbuck, I allow them one-sixth part, or two thousand dollars, and the money paid for tugs two hundred and seventy dollars, in all two thousand two hundred and seventy dollars. As it was said that the libellants were entirely agreed or could agree upon the division among themselves, and as their relations to each other are not such that any of them appear to need the protection of the court, no order is made upon that subject.

Decree for \$2270 salvage.

SEVENTY-EIGHT BALES OF COTTON.

JULY, 1865.

- Cotton picked up at sea by a cruiser of the United States, under circumstances which show that it has recently been abandoned, either by an enemy or by a neutral engaged in breaking the blockade of an enemy's port, is rightly proceeded against as prize rather than derelict.

In order that goods should be condemned as prize, it is not necessary that they should be taken by force, nor from actual hostile possession ; it is enough that they have been rightly taken and are the property of an enemy.

Seventy-eight Bales of Cotton.

PRIZE. — The following facts appeared. On the forenoon of the thirty-first day of May, 1864, the United States public armed steamer *Vicksburg*, attached to the North Atlantic blockading squadron, and then cruising on what was known as the outside blockade, discovered a steamer lying to, some fifty miles from the coast of North Carolina. The stranger, on discovering the *Vicksburg*, immediately got up steam and endeavored to escape; was chased by the cruiser, but gained on her, and after some hours escaped. It afterwards turned out that this steamer was the *Georgiana McGaw*, bound from the Bermudas to some blockaded port; and the deposition of her master was taken in the case. When she was first seen, two merchant vessels, a barque and a brig, were lying to, not very far from her. Soon after the chase began, the officers and crew of the *Vicksburg* saw cotton floating in and near the wake of the *McGaw*, which some of them supposed to have been thrown from her to aid her escape, as was usual with cotton-loaded blockade runners. After giving up the chase, the *Vicksburg* returned upon her course, and on the same afternoon and the next morning picked up the cotton which was the subject of this proceeding. The two vessels above mentioned were found near where they had been seen before, and were evidently engaged in picking up cotton. The seventy-eight bales were sent to the port of Boston, by Captain Braine, commander of the *Vicksburg*, and at his request were libelled here by the district attorney, as prize. After the cause had been pending for some little time, Captain Braine, in behalf of the officers and crew of his ship, intervened by petition in the nature of a libel for salvage, and alleged that the goods were, in fact and law, not prize but derelict, and that the whole proceeds ought to be awarded to him and his officers and crew. No claimant appeared.

It was proved that this cotton was not thrown over from the *Georgiana McGaw*, and that it must have been thrown over within a day or two before it was found, and in all probability from some vessel which had recently broken the blockade, and was forced to make the jettison by stress of the hostile pursuit of our cruisers.

W. G. Russell, for the officers and crew of the *Vicksburg*. This is derelict property, which, under the circumstances, belongs to the finders, because there are no elements of capture to make it

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prize, and there are no owners who would be permitted to appear in this court, since they are undoubtedly enemies. The goods were not abandoned with any hope or intention of recovering them, and must be regarded as *bona vacantia*. To the point of capture, see *The Two Friends*, 1 Rob. 283. We have no *droits* of the admiralty in this country, and if the goods are simply derelict, the whole will go to the finders, after the lapse of a sufficient time for the owners to appear and claim. Such has been the practice, of late, in this district and in several others. See Marvin on Wreck and Salvage, § 131 *n*.

R. H. Dana, Jr., district attorney, for the United States. This is clearly a case of prize. Enemy property taken in any lawful manner, within the ebb and flow of the tide, is prize. *The Aquila*, 1 Rob. 41. In *The Emulous*, 1 Gallison, 563, 8 Cranch, 110, the supreme court does not overrule Mr. Justice Story on this point; the question there was of the lawfulness of the taking.

If this cotton should be considered derelict, the United States, and not the finders, would be entitled to the remainder, after due salvage is awarded, in case no claimant appears. Dane, Abr. tit. 76, art. 7, § 16; 3 Kent, Com. 356; 28 *Bags of Cotton*, 2 Am. Jurist, 119.

LOWELL, J. [after stating the facts]. Upon this state of facts the questions, which have been argued with very great learning and ability, are, whether these goods are prize of war, and if not, what are the rights of the salvors or finders? I shall find occasion to deal with only the first.

For the Vicksburg, the position is taken that these goods were simply derelict; and that they were open to the occupancy of any finder, whose rights are the same as in time of peace; that in peace the finder is, by our law, entitled to a reasonable salvage, which, where the property was utterly derelict on the high seas, would ordinarily be one-half; and that he has, besides, a title to the remainder, when the lapse of time or other circumstances show that no owner will appear; and that in this case no owner can ever appear, because the goods, having broken blockade, would not, by our courts, even after the war is over, be restored to a person whose title would be so tainted with illegality. That the goods were derelict, is evident. But I think they were also prize of war.

The question of prize or no prize is essentially a question of title. Enemy property, or property found so engaged in an unfinished voyage of illicit traffic with the enemy as to be *quasi* hostile, is liable to condemnation; property not in that predicament is not. And these goods are, confessedly, in that predicament, though under which branch of it cannot be known.

But, it is said, in order that goods should be condemned, they must be captured from the enemy, and here was no capture. Sir William Scott is quoted as saying in *The Two Friends*, 1 Rob. 283: "I know of no other definition of prize goods than that they are goods taken on the high seas, *jure belli*, out of the hands of the enemy." It is sought to be inferred from this remark of an eminent judge, that there must have been a hostile possession at the time of the taking, which possession has been changed by the captors. But it is evident that no such meaning was intended, because in the great majority of all the condemnations pronounced by that learned judge, the property came from neutral or friendly possession. Nor can it be maintained that the application of force, actual or constructive, is necessary. In many cases that have passed into judgment the goods were driven within the jurisdiction by stress of weather, or of a hostile pursuit which had ceased, or had been detained by an embargo; and the taking has often been only by the marshal, on his warrant, after due proceedings had in the prize court itself.

It is true there often is a capture; and when that is the case, the title and right are derived through that capture, and it must be such as the laws of war authorize. And the prize court may well refuse to try the question of prize, when it appears that the captors invoke its aid in favor of a title improperly acquired. *The Conqueror*, 2 Rob. 303. As, if the capture be within neutral territory, and the neutral government require restitution to be made. So in a remarkable case before Sir William Scott. *The Jonge Jacobus*, 1 Rob. 243, where the officers and crew of a British frigate who had been saved from shipwreck and brought into Yarmouth by a neutral vessel with enemy cargo on board, proceeded against the vessel and cargo as prize, the court very properly refused to examine the question, so far as the vessel was concerned, and intimated that the same rule would have been applied to an enemy

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vessel, as it clearly ought. But in that very case the learned judge observed that the cargo might properly be condemned; and I suppose it was condemned. This case shows very clearly that no capture is necessary, and that all the court requires is jurisdiction properly obtained, and then its inquiry is into the title. Thus the cargo was thought (though wrongly, as it seems to me on the merits of the question) not to be entitled to the safe conduct which was implied in favor of the ship, and so, though never captured, it was condemned.

In the case of *The Emulous*, goods owned in England and found here in the custody of one of our citizens on the breaking out of the war with Great Britain, in the year 1812, were libelled as prize, and Judge Story, following Lord Stowell and the practice of the British towards us in that war, condemned them as prize, but the supreme court reversed this decision, not on the ground of want of capture or want of taking from hostile possession, but because they were not willing to admit that the laws of war as understood and practised in this country authorized such reprisals. *The Emulous*, 1 Gallison, 563; s. c. 8 Cranch, 110, *sub nom. Brown v. U. S.* In the case from which the quotation has been made, the question was only whether goods captured at sea could, after being landed, be proceeded against as prize; and Lord Stowell was only deciding that the taking was so far maritime as to make it a question properly of prize and not of common-law jurisdiction. He was not attempting to give an exhaustive definition of prize; though, as I understand his language, it is perhaps as good a definition as could easily be made. Including neutral goods liable to condemnation from being involved in illegal trade under the phrase enemy goods, which you must do in any interpretation, I understand him to mean simply this: "Prize is enemy property taken at sea, *jure belli*." That is, taken into our hands, and therefore out of the enemy's hands.

But, it may be said, in all the instances above given, the taking, whether forcible or not, and whether from hostile possession or not, was, at all events, *jure belli*; and here the taking was by right of finding, which would equally exist in time of peace, or in favor of a non-commissioned vessel; as of the barque or brig which did take some cotton without interference by the Vicksburg.

In point of law the possession was taken and held *jure belli*, and was a capture. If the hostile or *quasi* hostile owner had, immediately after the taking, demanded the goods, tendering a sufficient salvage, the answer would have been, and rightly, that they were held as goods liable to be condemned to the United States, as having been taken on the high seas, *jure belli*. And the merchant vessels, if American (as one of them was), might lawfully have set up the same right; but if neutral, they must have yielded to the demand of the true owner. There is no difficulty in holding the goods to have been both derelict and prize; derelict so as to give a primary right of possession to the finder, and prize to give the sovereign of that finder, if a hostile belligerent as regards the owner, the right to condemn the property as prize. And to this effect is the language of Sir William Scott in *The Aquila*, 1 Rob. 41, a case of a ship and cargo found at sea: "This case, therefore, is to be considered as derelict; and in that form the proceedings were originally commenced against both the ship and cargo; the ship has been claimed and restored; the cargo has not been claimed; but there was reason to expect an owner would appear, as there were papers on board describing it to be the property of a neutral owner. Some suspicions occurred, however, that it was in fact the property of an enemy; and under these circumstances it became expedient to proceed against it as a prize, for the purpose of meeting the pretensions of the ostensible, neutral owner, and of bringing the examination of his claim, where alone it could be properly discussed, into the prize court." If this is not so, the absurdity follows which was urged at the bar, that the crew of a vessel chased by a hostile cruiser have only to abandon her, and if she is taken by another cruiser that did not join in the chase, then, though fully armed for war, she is only derelict and not prize.

It is argued that if property belonging to one of our citizens had been captured by an enemy and had then been abandoned by him and found by one of our cruisers under circumstances and in the way that these goods were abandoned and found, such finding would not be a recapture, and the finders would not be limited to the statute rate of salvage as for a recapture. This is true. But recapture is a matter of statute, and its meaning is not necessarily

the converse of that of capture. By definition it denotes a taking from hostile possession. Capture affects the title of the true owner: recapture only the possessory right of the captor. By capture the goods come into the possession of an enemy; but do not become his property until condemnation. If abandoned before condemnation, the title of the original owner attaches again, and the finder, if a friend, finds for him, and divests no right of the enemy, for that was wholly possessory and was lost by the abandonment. This is well shown by the case, among many others, of *The Adventure*, 8 Cranch, 221, in which a French captor gave a British prize to an American shipmaster; and the supreme court held that the original British owner should have the remaining property after salvage paid; and, war in the mean time having occurred with England, allowed him till peace to make his claim, on the principle of the case of *The Emulous*, above referred to.

But suppose the Vicksburg, with this cotton on board, had been taken by the enemy, and carried into one of their ports and before one of their tribunals, would not the captors of the Vicksburg have been entitled to salvage from the original owners of the cotton, as upon a recapture, or must they have restored without salvage?

Finally, it is urged that our prize acts regulating the awards of prize-money, and prize proceedings generally, speak only of the capture of vessels and their cargoes, and of the relative force of the vessels, giving the captors the whole of the prize, if the latter is of equal or superior force to the captors, and the half if she is of inferior force: but that here is no vessel, and no force, superior or inferior; wherefore, it is concluded, there can be no prize.

But the prize acts do not undertake to define what shall be lawful prize, nor, in general, how the court shall obtain jurisdiction to pass upon that question. They regulate some of the proceedings of the captors, and of the courts, and the mode of ascertaining and distributing the prize-money. If the property is water borne, it need not be in a vessel, and if it be properly brought within the jurisdiction of the court, it need not be by what would be in the most strict and literal sense a capture. If the takers should not come within the benefits of the prize acts as captors in

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any particular case, it would be their misfortune, in so much that they must seek their redress in another tribunal. But that they would eventually be compensated, we cannot permit ourselves to doubt. It has been the habit of Congress in all our wars, I believe, to award suitable remuneration to non-commissioned captors, and all others who have performed services of this nature, for which the law has made no effectual provision. And, indeed, courts of prize have power to grant a reasonable compensation under the name of salvage, which in theory, perhaps, is rather for the preservation and bringing in of the goods than for the original taking; and in the case of mere derelict there would be no difficulty in considering that the salvage should be as large a proportion of the value as our acts now allow for prize-money in the case of an ordinary unarmed prize, that is one-half; *The Dos Hermanos*, 10 Wheat. 306. I find no such difficulty, however, in this case, because this court has always construed the acts to include all lawful takings by commissioned cruisers, whether any vessel or opposing force were present or not. If the force is not equal or superior, it is taken to have been inferior. And I do not doubt that this is the correct interpretation.

I conclude, therefore, that these goods must be condemned as prize, and distributed accordingly, the Vicksburg being entitled, as sole captor, to one-half of the proceeds.

Decree accordingly.

THE WANDO,

SEPTEMBER, 1865.

Coin taken in a vessel which was captured in the act of breaking blockade, is liable to condemnation, though belonging to a neutral, and not intended to be used in trade.

Nor will such coin be exempted from this rule by being the property of the neutral master; at least, if his conduct as master and as a witness is open to just animadversion.

An amount of money sufficient for the master's necessary expenses, while detained here, will be allowed him out of such coin.

LOWELL, J. The Wando, or Let Her Rip, was captured near Wilmington, in North Carolina, having run out of that port, with

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a full cargo of cotton, in the course of an unfinished voyage from Nassau to Wilmington and back to Nassau. Her papers were all destroyed before the capture, and her national character does not distinctly appear by the evidence. The only claim is by the master, who is a British subject, for restitution of about five thousand dollars in American gold coin, which is alleged to be his private property. The master's own statements, made in his several affidavits, are not consistent with each other; but I am inclined to believe that the story told in his deposition, before he had taken counsel, or was likely to see the bearing of the facts upon the law of the case, is true, namely, that the money was, in part, the earnings of this voyage, and in part savings out of former earnings. This is the most favorable view, at all events, which the evidence will allow me to take of his case. And the question is, how shall the court deal with this coin upon this state of facts?

It is conceded in the argument for the claimant that trade with Wilmington was illegal, and that any property engaged in that trade, or any thing which formed a necessary part or instrument of the mercantile adventure, must be condemned. But the allegation is, that this money was the mere personal and private property of the master, not used nor intended to be used in trade; and it is said that neutral property, so situated, is not liable to forfeiture.

In respect to the coin, which was a part of the wages for this unfinished illegal voyage, I think it must be considered not to come within the exception contended for. It is clear that the master could not claim his wages here, nor his freight; and if his outward freight had been paid at Wilmington, and were found on board *in specie*, it must have been condemned. And so, of these wages. They were so involved in the illegal transaction that they must, upon the admitted principle, follow the fate of the ship, cargo, and freight. A somewhat analogous point is decided in *The Frederick*, 5 Rob. 14.

But the exception contended for cannot be maintained. The right of a belligerent, who has established a lawful and effective blockade, is to prevent all intercourse with the blockaded port, and not merely the intercourse of traders. His object is to shut out all aid and comfort, and even all information, every thing which can by possibility be turned to the advantage of the enemy or to

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his own injury. The visit of a neutral immigrant vessel, or yacht, or mail carrier, or ship of war, or merchant vessel, are all equally illegal, unless with the consent of the blockading power, and may be restrained by him with such a degree of force, be it more or less, as may be necessary under the circumstances. And the violation of this right subjects private property in general to forfeiture. In the case of a neutral public ship indeed, the right of capture may not exist, but this is because for wrongs done by public officers of a friendly government, redress is sought directly of the government itself, which is presumed not to have authorized such acts. Governments do not proceed against each other *in rem* excepting when they are at war, or when redress has been refused them. But this is a question of remedy and of international comity, and does not at all depend upon the fact that the public ship is not a trading vessel.

It is equally true that the persons of neutrals are subject only to such restraint as may be necessary to prevent the illegal act, or to compel the presence in the prize courts of important witnesses. But this exemption applies alike to traders and to non-traders, and so throws no light on the present question. And I think the principle is that private property which may aid the enemy is presumed to be hostile, and this for several reasons: one is, because of the very great difficulty attending the proof of intent in matters of this kind, and the great opportunity for fraud and deception; and again, because the intent of the owner may not control the action of the enemy. Thus, if contraband of war be taken into the blockaded or besieged port, who shall say that it will not be at once confiscated and turned to warlike use by the besieged? So of a vessel in ballast; and so of coin.

In this case, moreover, the evidence of intent is entirely insufficient. It is not easy to believe that the master would not have used the money in trade if he had found a good opportunity to do so: as indeed he did use a part of his money to buy cotton, which was on board, and for which he makes no claim.

And it makes no difference that the money was actually on its way out from Wilmington when captured. It is equally liable to forfeiture for having been carried in, the voyage not being finished. And the mere bringing out of property through the blockade would,

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no doubt, subject it to a like forfeiture. See *The Rapid*, 8 Cranch, 155.

I am not to be understood as deciding that the mere personal effects or the pocket-money, intended for the subsistence or expenses of the owner, whether he be an enemy or a neutral, is to be seized. Such is not the law nor the usage. In this case the marshal gave the claimant, with the consent of the captors, about two hundred dollars out of the sum taken, for his expenses. And, as he was detained here for a considerable time, I shall allow him two hundred dollars more. The rule I am intending to lay down is, that money as well as other property, in amount sufficiently large to be considered by the court, especially if capable of being used in trade if occasion occur, and taken breaking blockade, is to be deemed hostile, without regard to the neutrality of its owner, or to his actual intent to employ it in trade. It is for him to bring himself within any of the admitted exceptions, such as a license, &c.

Although the case was not put on that ground, I am aware that courts of prize exercise great lenity towards masters and seamen; and that the private adventure of the master has been restored in many cases in which the vessel and cargo have been condemned. But without examining the limits which ought to divide the discretion of the courts from the indulgence of the captors,—limits which I am inclined to think have been sometimes overstepped by the former,—it is enough to say that in this case the conduct of the master, by the false statements which he made to the marshal about this matter, by his prevarication in his affidavits, but especially by the spoliation of the ship's papers, are such, that he cannot fairly expect the exercise of the peculiar consideration in question.

Decree of condemnation.

R. H. Dana, Jr., district attorney, for the United States and captors.

C. G. Thomas, for the claimant.

Fifty Thousand Cigars.

FIFTY THOUSAND CIGARS.

SEPTEMBER, 1865.

A deputy-collector of customs who receives information by a telegram addressed to the collector, that a certain vessel within his district has goods on board liable to forfeiture, and who sends the telegram to the collector, does not thereby become the informer under the Statute of 1799, as against the person sending the telegram, though he may have verified some of its statements and have sent information of such verification to the collector.

Nor is the person who carries the telegram and information such informer; nor the officers who seize the goods but make no new discoveries.

Information received by a deputy-collector under such circumstances, is received by the collector, within the meaning of the statute.

THIS was an information against fifty thousand cigars and a small quantity of sugar, seized on board the schooner *Atlantic* at Holmes Hole, in the collection district of Edgartown, for smuggling. The property had been heretofore condemned as forfeited, and the proceeds (\$4927.49) paid into the registry of the court. The question now was between several persons claiming as informers, under the statute.

On Saturday, the 4th of March, 1865, Lewis B. Smith, deputy collector of customs at Portland, Me., obtained information that a quantity of cigars intended to be smuggled were on board said schooner, then reported at Holmes Hole. He communicated the fact to Israel Washburn, Jr., collector of the port of Portland, and requested him, as he was better known than himself, to telegraph it to the collector of the district where the *Atlantic* was. The following despatch was accordingly sent: —

"Confidential."

PORTLAND, March 4, 1865.

To Collector of Customs, Holmes Hole, Mass.: I have information that a very large quantity of cigars in schooner *Atlantic* are intended to be smuggled; reported at Holmes Hole, 2d inst.

(Signed)

ISRAEL WASHBURN, Jr.

The despatch reached Holmes Hole on the 4th, a little after sunset, and was opened by Mr. Beetle, the deputy-collector of customs for the district, who resides there, the collector living at Edgartown, eight miles away. Mr. Beetle immediately put an officer on board with instructions to see that nothing was landed. No cigars appeared on the schooner's manifest. The wind coming fair on Sunday morning, the officer, without the

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knowledge of Mr. Beetle, came ashore, and the schooner went to sea. A head wind, however, coming up, she put back in the afternoon, and Mr. Beetle again put the officer on board with instructions to prevent any thing from being landed and to detain the schooner. Mr. Beetle testified that he then went to the house of Mr. Luce, an inspector, about four miles from Holmes Hole, on the road to Edgartown, and sent him with the despatch to Mr. Vinson, the collector at Edgartown, telling Luce to give the despatch to Vinson, and to tell him all about the matter, and what had been done; and to have the revenue cutter come round and make the seizure; that he himself hastened back to Holmes Hole to see that the schooner did not escape; that Luce went, and the cutter came round in the evening, the schooner was taken possession of, searched, and the cigars and sugar found; that if the cutter had not come round, he should have obtained a force and seized her, but that he thought it better to have the cutter do so if she was at hand.

Mr. Vinson, collector of the port, testified that Luce came to him, told him that he believed the schooner *Atlantic* had cigars on board intended to be smuggled; that Mr. Beetle had put an officer on board, who came ashore; that she left the harbor, but came back again, and that Mr. Beetle had put the officer on board again; that no cigars appeared on her manifest; and then handed him the despatch from Mr. Washburn. Mr. Vinson further testified that it was in consequence of the information and the telegram thus received that he ordered the seizure to be made; that he could not discriminate between them, and should have made the seizure from either.

The persons claiming as informers were Mr. Smith, who caused the telegram to be sent, Mr. Luce, Captain Usher, commanding the revenue cutter, Mr. Beetle, and Mr. Andrews, the inspector put on board by him.

The affidavit of Mr. Luce was presented, in which he said that he carried no message from Mr. Beetle to Mr. Vinson, but gave original information; and, on Mr. Luce's behalf, it was contended that he appropriated the contents of the despatch, made the information his own, and then communicated it to Mr. Vinson as original, and was, therefore, the informer.

Fifty Thousand Cigars.

LOWELL, J. In this case a large quantity of cigars, and a small quantity of sugar and molasses, have been condemned and sold, having been found on board the American schooner *Atlantic* under circumstances which showed very clearly an intention to smuggle them into the United States. Several persons have filed petitions for the share of the proceeds of the forfeiture provided by sect. 91 of the Collection Act of 1799, which enacts, among other things, that in all cases where such fines, &c., shall be recovered, in pursuance of information given to the collector, by any person other than the naval officer or surveyor of the district, a certain share shall be given to such informer.

That this court has jurisdiction of this controversy is clear; *Hooper v. 51 Casks of Brandy*, Daveis, 370; *Westcot v. Bradford*, 4 Wash. C. C. 492; *McLean v. U. S.*, 6 Pet. 404. [The court then stated the facts, substantially as above, and proceeded:]

It is not denied that some officers of the customs, other than the collector himself and the surveyor and naval officer, all of whom share in all these forfeitures, may themselves be informers. This has been decided so far as inspectors are concerned, and perhaps is true of deputy-collectors. *Hooper v. 51 Casks of Brandy*, *ubi supra*; *Brewster v. Gelston*, 11 Johns. 390; *Sawyer v. Steele*, 8 Wash. C. C. 464. And, as to officers of revenue cutters, the act itself is explicit in their favor. But I am not aware that it has ever been said or thought that an officer, being charged with the special duty of searching a vessel, in pursuance of definite information given by another person, could become the informer by reason of the diligence, fidelity, and success with which he prosecuted the search, and found what he was sent to seek. To allow this would be contrary to the general principles of law, and to the intent of the revenue laws, which expect the collector and his subordinate officers to pursue the course indicated by the information with all the means and effort that may be necessary.

Who, then, gave the collector the information in pursuance of which this search and seizure were made, and the forfeiture was recovered? Mr. Beetle and Mr. Luce each says that he did; the former, because he received the telegram and sent it to the collector; and the latter because he carried the telegram, and gave,

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as he says, some oral information. Mr. Luce denies that Mr. Beetle "sent" him to the collector, and says that he agreed with Mr. Beetle, that, as the wind would keep the vessel in port, it was better to consult with the collector, and to procure the services of the cutter. There is no doubt that he carried the telegram, with Mr. Beetle's consent; and whether he is to be considered as Mr. Beetle's messenger, or not, is immaterial, in the view I take of the case. Mr. Vinson says, in his deposition, that, acting on the despatch, and on oral information received from Mr. Luce, he ordered the search and conditionally the seizure, and that either information would have been sufficient. It is to be regretted that Mr. Vinson should have made this general statement, which is calculated to leave an erroneous impression. The evidence shows quite conclusively that Mr. Luce had no information to give, beside the telegram and its contents, which was of any importance. Neither he nor Mr. Beetle knew any thing about the vessel or her cargo or papers, excepting that no cigars were set down in the manifest; a fact of no importance in itself, and which had not attracted Mr. Beetle's attention before he read the despatch, and was not calculated to do so, any more than the absence of all other goods which might, by possibility, have been on board. When the despatch was received, he recollected, or found by examining his records, that no cigars were mentioned in the manifest. But this fact was included in the information given by the despatch; for, if there were cigars on board intended to be smuggled, they would certainly not be found in the manifest. So that this fact, independently known to him, only confirmed the despatch to this extent, that if it were true, as therein stated, that a large quantity of cigars were on board, then its further statement that they were intended to be smuggled, was also probably true. I say this is abundantly evident from all the testimony in the case, including Mr. Luce's affidavit and from the subsequent particular explanation of the collector himself of what Mr. Luce did tell him. Now it is not to be believed that a prudent collector would have seized this vessel or have searched her on the mere information that she had no cigars on her manifest. So, then, in point of fact, the information which Mr. Luce orally gave, besides the above-mentioned fact, unimportant of itself, could only have been that he

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had read the despatch and believed, from the known character of Mr. Washburn, that it was likely to be well founded. But this was information which Mr. Vinson hardly required, and the giving of which cannot constitute Mr. Luce the informer in this case.

Again, it is assumed, that the collector must personally receive the information which is the foundation of such a claim; and thereupon it is argued that Mr. Beetle and Mr. Luce, or one of them, as the evidence may be thought to favor the views of one or the other, appropriated the information contained in this telegram, and gave it out again to the collector, as their own, and so became the informers. But, on this supposition, they had no right to read the telegram, or, reading it, to do any thing but forward it as quickly as possible to the collector. The law does not recognize a title to telegrams, or their contents, acquired by appropriation by persons intervening between the sender of the despatch and the person to whom it is addressed. The telegraphic operator, who has not filed a claim, would stand, in this respect, full as well as these petitioners: he was nearer the source of knowledge, and his position was not more confidential. But the assumption is itself without warrant. The deputy-collector has, in law, a recognized position, with all or nearly all the powers of a collector; insomuch that, for example, an oath required by statute to be taken before the collector is well taken before his deputy, without proof of the absence or inability to act of the principal; *United States v. Barton*, Gilpin, 439.

It is plain, therefore, that Mr. Beetle had power to receive this despatch for the collector, and to act on it. He was the collector, for all purposes, at Holmes Hole, and the moment he received the despatch, the collector had, in law, received it; the information had been officially communicated, and the inchoate right to the reward had attached. All that was done after that was executive, and was in pursuance of the information so given and received.

I must decide, therefore, that Mr. Smith was the person and the only person who gave to the collector of the district of Edgartown the information, in pursuance of which the forfeiture of the cigars was recovered, and is entitled to one-fourth of their net proceeds. The evidence does not clear up the question about the

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sugars, and their value is comparatively trifling. I cannot say that any one informed against them, as the case is presented. The form of decree is shown in *Jones v. Shore's Ex.*, 1 Wheat. 475.

Mr. Smith adjudged sole informer.

R. R. Bishop, for Smith.

W. J. Forsaith, for Luce and the other petitioners.

JONATHAN BOURNE & AL. v. ABRAHAM ASHLEY & AL.

SEPTEMBER, 1865.

In a proceeding in the nature of trover for the conversion of a whale in the Okhotsk Sea, the measure of damages is the value of the whale at the time of the conversion, which can be found by taking the value of the oil and bone at New Bedford, which was the ruling market of the country at the time, and was the home port of both vessels, less the expense of cutting in and boiling, freight and insurance; to the amount thus ascertained, interest at six per cent is to be added.

LIBEL promoted by the owners of the ship *Washington* against the owners of the ship *Endeavor*, both of New Bedford, for the conversion of a whale in the Okhotsk Sea, in July, 1858. The merits of the case had been decided by Judge Sprague in favor of the libellants, and the only point remaining open was the measure of damages, which came up on the assessor's report.

T. D. Eliot & T. M. Stetson, for the libellants. We are entitled to receive the highest value of the oil and bone at New Bedford, without any deductions. Our vessel was on the ground, and the men were ready to cut in and boil the whale, and were obliged to come home without a full catch; *Taber v. Jenny*, 1 Sprague, 315.

R. C. Pitman & R. A. Pierce, for the respondents.

LOWELL, J. I hold the measure of damages in trover to be the value of the goods at the time and place of the conversion. In some courts the plaintiff has been permitted to recover a higher price if the goods have risen before the time of trial. This rule has led to great difficulties, and those courts have been obliged to adopt a good many artificial exceptions, such as that the suit must be brought within a reasonable time, &c. *Romaine v. Van Allen*, 26 N. Y. 309. The weight of authority is in favor of the other

rule; *Watt v. Potter*, 2 Mason, 77; *Pierce v. Benjamin*, 14 Pick. 356; *Pinkerton v. Manchester & Lawrence R. R.*, 42 N. H. 424; *Sedgwick on Damages*, 481; *Coolidge v. Choate*, 11 Met. 79. And the value which governs is, of course, the market price in the case of articles which have a market price; though the wrong-doer cannot escape the payment of damages for the conversion of an article which is of value only to the owner, by showing the absence of a market for the article; *Stickney v. Allen*, 10 Gray, 352.

In this case, the respondents introduced the evidence of very respectable experts to show what they would be willing to give for whales in the Okhotsk Sea. The assessor finds the average estimate to be one-third of the value of the oil and bone at New Bedford. But all this evidence merely goes to prove that there is no market price for whales at that place. It is undertaking to show the value of an article by the price which persons will give for it who do not want it; whereas market price presupposes the presence of persons who do want the article. There is no market price for whales anywhere, because they are never brought to market; nor is there any market for oil and bone in the Okhotsk Sea. These facts do not deprive the libellants of the fair value of their whale, but only oblige us to arrive at it by other means than such conjectures. We must discover, as well as we may, the value of this article to a person who happened to want it, for the respondents have put themselves in that situation. This value must be the price of the oil and bone in some market, less the expense of making the oil and bone out of the whale and getting it to market. Some of the witnesses, indeed, when their attention was directed to the true point of inquiry, said that the oil and bone were worth in the Okhotsk Sea all they were worth in New Bedford, less freight and insurance. See *Coolidge v. Choate*, 11 Met. 79; *Selkirk v. Cobb*, 13 Gray, 313. The market of New Bedford, which the witnesses and the assessor adopted, is the controlling market of the country as well as the home port of both vessels, and furnishes the proper standard. The damages, then, will be the value at New Bedford of the oil and bone made, or which might have been made, from this whale, less the average necessary expenses of converting the whale into oil and bone, and freight, insurance, and other usual

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charges, with interest on the sum thus arrived at. It was strongly urged that most of those charges and expenses ought to be rejected, because they were not incurred by the libellants' request, and did them no good, since their men were ready to do the work, and their vessel was able to bring home the product. For this position, *Taber v. Jenny*, 1 Sprague, 315, is cited. I do not profess to understand that case fully; but the assessor's report and the arguments seem to assume that the oil and bone, actually brought home, ought to be paid for, and the only question was, what charges should be deducted, and this turned upon the fact that the libellants' vessel was unable to fill up her cargo, and, therefore, the labor and freight would have cost them nothing. The rule which I have taken, and which is the ordinary rule, was not argued. A rule which makes the damages depend on the arrival of the vessels, and on the good or ill fortune of their adventures after the time of the conversion, cannot be upheld. The action accrued immediately, and might have been maintained, though the respondents had never received the oil and bone at the home port, and though the libellants had got a better whale immediately after this was lost; and the measure of damages ought to be the same whenever and wherever the action is brought, and whether the libellants were skilful or otherwise, and fortunate or not, and whether the respondents were insured or uninsured. In short, it is unsafe to base the amount of the recovery, in a case of this kind, upon circumstances happening afterwards. It is upon these very grounds that the rule of time and place of conversion was adopted.

The report will be recommitted to the assessor to find the expense of cutting in and boiling, which is the only element of the computation not fully presented by him, unless the parties agree upon it. I see no reason for denying costs to the prevailing party.

Ordered accordingly.

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THE SELMA.

DECEMBER, 1865.

It is not sufficient, in order to entitle a vessel to share in the distribution of a prize, that it was within signal distance, and formed part of the force commanded by the officer who made the capture, if its situation was such that it could not have rendered any assistance in the actual conflict in which the prize was taken.

PRIZE. — This case arose out of the memorable action of the 5th of August, 1864, in the Bay of Mobile. After the ships under the immediate command of Admiral Farragut had succeeded in passing Forts Morgan and Gaines, which guarded the main ship-channel into the bay, they had an obstinate engagement with the rebel iron-clad ram, the Tennessee, which resulted in her surrender; and soon after captured, with little or no trouble, the Selma and other vessels, which are the subject of this proceeding. The case of the Tennessee was sent to another court.

Those of our vessels which were not adapted to passing the batteries, were stationed, some of them near the main channel, and others in Mississippi Sound, about twenty miles distant by water from that entrance, but much nearer the bay by way of Grant's Pass, had that passage been open; but it had been wholly obstructed for the time by barriers put there by the rebels. The duties of these divisions were to aid the troops in landing and besieging the forts, and to pursue any hostile vessels that might approach their stations from without or from within the bay; and the first division, besides, was to assist any of our ships that might fail to pass the batteries, and put back in distress.

The question which arose upon this state of facts, was whether both or either of these divisions stationed outside the bay were entitled to share in the captures above mentioned.

LOWELL, J. Upon this new and difficult question, I have thought proper, in the absence of full reports of most of the cases in our own courts upon analogous points, to seek for light, not only in such of them as have come to my knowledge, but also in the judgments of the prize courts in England, where questions of joint capture have been much considered.

By the English law, as applied to ordinary cases of prize,

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the term captors, or more strictly takers, includes not only those who actually make a prize, but also all who are associated in the taking. The association may be casual, as where several vessels happen to join in a chase, or to be in sight of a capture; or it may be more permanent, and imposed by superior command, as where several vessels are engaged in a blockade or other enterprise in common. In the former case, there is by the English law a presumption of fact, that all king's ships in sight, during the chase or at the time of the capture, did by their presence encourage the friend and discourage the enemy; and that such was their intent. But, if it turn out that they could not have been seen by one or other of the belligerents, or that they had no intent to aid, but were engaged upon some duty or business inconsistent therewith, the presumptions are rebutted, and they cannot share. *The Galen*, 2 Dodson, 24; *The Rattlesnake*, ib. 32; *La Melanie*, ib. 125; *The Forsigheid*, 3 Rob. 316; *The Lord Middleton*, 4 Rob. 153.

In the case of a common enterprise, duly authorized, it is only necessary to show, that the claiming vessel was one of the associates, and that the capture was made by another of them, and was within the purpose of the association; and, if these facts are shown, the actual position of the claiming vessel at the time of capture is unimportant. *La Henriette*, 2 Dodson, 98; *The Harmonie*, 3 Rob. 318; *The Guillaume Tell*, Edwards, 6; *The Naples Grant*, 2 Dodson, 286.

In both classes of cases, the association of vessels has been looked upon as a sort of commercial adventure or partnership, more or less permanent, to which each contributed such share of time and effort as chanced to fall to him to render, and in the gains of which each ought to have his equitable dividend. The doctrine is incidentally but well expressed by Lord Stowell in the phrase, that, in such cases, privity of purpose creates community of interest; *The Dordrecht*, 2 Rob. 64.

It has often been doubted by eminent English judges, whether by this construction the plain language of the statutes, giving prizes to the takers, had not been unwarrantably extended. And it is a singular fact, that the word takers, in another part of the acts, has received from the courts a totally different interpre-

tation. The English prize acts have usually contained a provision for giving head-money, or a reward reckoned according to the number of persons on board the hostile vessel, to the takers of any ship of war. In cases arising under this part of the statutes, it is held that the object of the legislature was to encourage personal gallantry and exertion, and constructive captors are, as a general rule, excluded from sharing in this bounty; although, under the same statutes and concerning the same vessel, they may come in as takers of the prize itself. Accordingly, it has been decided that joining in a chase, or being in sight of a capture, raises no presumption of a joint taking, so far as head-money is concerned; but it is for the claiming vessel to show, that the surrender was in fact partly due to her presence or co-operation. *L'Alerte*, 6 Rob. 238; *L'Hercule*, *ib. note*; *La Gloire*, Edwards, 280. And parliament afterwards ratified and adopted this distinction.

When our prize acts came under discussion in the course of the war, now happily ended, the courts with much uniformity gave to the word captors a meaning more nearly like that established in England for cases of head-money than that there followed in ordinary prize causes. This course of decision is ably vindicated by my eminent predecessor, in the case of *The Cherokee*, in 1864, 12 Am. Law Register, 289.¹ His opinion is founded upon the usual and obvious meaning of the language of the statutes, as well as upon their general purpose. And it may be added to the reasons given in that judgment, that the intent of our law clearly is to encourage personal gallantry, enterprise, and perseverance, whether applied to the capture of armed or of unarmed vessels. Thus the whole net proceeds of a prize are given to the captors, when she is of equal or superior force to the vessel or vessels making the capture, but only one-half where she is of inferior force. Again, the head-money which our law grants is larger, when the hostile force is equal or superior. But no head-money at all is given, excepting for hostile vessels of war sunk or destroyed; and, when due, it is to be distributed like prize-money: showing that the grant is intended as a substitute for the prize itself. Stat. 1864, ch. 174, §§ 10, 11; 13 Stats. 300.

¹ 2 Sprague, 235.

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The principle of distribution, therefore, is not varied by any difference in the character of the prize ; and our courts, as I have said, have adopted the narrower and more obvious of the constructions which the English tribunals have applied to the subject ; and have held that neither a whole fleet, engaged in the closest association known to the English law, that of an authorized blockade, nor such parts of that fleet as may by orders, general or special (for such orders may always be presumed), give chase to a vessel violating the blockade, are entitled to be considered as constructive captors ; but only those which fulfil the statute definition by being within signal distance of the actual captor at the time of the capture. That the government and the navy have acquiesced in this view is shown by their action in their several spheres of duty, and by the fact that no appeal has been taken from any of these decisions to the supreme court. And, since these judgments were promulgated, congress has amended the law in other particulars, and has restricted rather than enlarged the class of constructive captors by adding to the former requirement — that the vessels claiming as such captors should be within signal distance — the further qualification that they should be “under circumstances, and in such condition, as to be able to render effective aid if required.” Stat. 1864, ch. 174, § 10. It may therefore be taken as the policy of our government, in all its departments, to construe these statutes in the general sense above indicated.

In the present case, it is in proof that all the vessels were within signal distance of all the others. But the vessels outside the bay were not so situated as to give effective aid in the naval engagement, which took place wholly within, because they could not pass the forts and other obstructions which guarded the channels. The case, therefore, stands upon the same footing as it would had the capture been made out of the sight of these vessels. And the question is, Whether the association was such between all the vessels, that those now claiming can be considered actual captors. And I am of opinion that they are not to be so held.

I am far from saying, that, in a general naval combat, the part which each vessel takes is to be scrutinized by the court, and particular rewards to be meted out, where the overwhelming presumption is, and always must be, that all have done the

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duty assigned them ; not even if that duty should happen to be only to stand and wait. But in this case, upon a careful examination of the candid and wholly impartial testimony of the distinguished commander of the fleet, I am not satisfied that the disposition made of the vessels, which were stationed outside the bay, was made with a view to the naval engagement. It seems rather to have been forced upon him by the fact that they could not take part in that engagement.

In the only American case which I have seen reported that touches this question, Judge Sprague decided that a vessel within sight and easy signal distance of the combatants, and ready and willing to afford aid to her own side, was not to be counted as one of the actual takers, in estimating whether the force was superior or inferior, if she was under orders not to join in the action without a special signal to that effect ; though she was held entitled to share in the prize-money ; *The Atlanta*, 2 Sprague, 251.

Suppose it had happened in the case now before me, as once occurred on the Mississippi under the same great captain, that only a small number of vessels had made good the passage of the forts ; and that they had found themselves only equal or inferior in force to the enemy within, and had then succeeded by their skill and gallantry in making this capture. It would be impossible, I think, under the case of *The Atlanta*, or on principle, to hold that the vessels outside were actual takers, and to reduce the credit and reward of the conquerors to the level of a capture by superior force. And it will not be easy under our law to define actual captors in such a way as not to require of them at least the qualifications of position and power to do service which the statute peremptorily imposes on constructive takers.

So far for the naval contest. But it is said that the claiming vessels performed important service, in conjunction with the army, in the capture of the forts ; and that without this capture the prizes might never have been brought off in safety. This service was highly important, especially in its effect on the general fortunes of the campaign ; but it is too remote to entitle the vessels or the army to be considered as actual takers of these prizes. Whether they could have been brought off or not, it is now impossible to say, though it may be inferred with some

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probability, that, being iron-clad, our fleet, which fully commanded the bay, could have run them out at some convenient season, or could have held them even to the end of the war. The naval capture, however, which was in no sense a surrender to conjoint forces, must stand upon its own merits, and be considered to have been complete when the last flag was struck; and subsequent aid, not directly in the nature of a salvage service, cannot confer a title by relation which did not arise out of the facts of the original taking.

The decree will therefore be for those vessels only that passed the forts. The case of *The Tecumseh* creates no difficulty, because she was destroyed by a torpedo while gallantly leading the way towards the enemy's vessels, and after having successfully passed the direct line of the land batteries.

I have considered this question with the more care, and arrived at its solution with the greater diffidence, because it is opposed to that of my friend the learned judge of the district court of the United States for Louisiana, by whom the proceeds of the ram *Tennessee* were distributed to the whole fleet. I have some reason to suppose that his decision, which has not been reported, was founded upon the apparent and attractive equity upon which the English cases of associated action have been put. But, while acknowledging the force of this consideration, I am constrained to believe that the stricter construction which I have given to the statute is more consistent with its language and intent, as well as with the judgments heretofore rendered upon it.

Neither class of captors was represented by counsel in the case before me; but I have had the benefit of a full and impartial statement of the facts, and analysis of the law, by the learned district attorney,¹ whose position and tastes have led him to give the subject of prize much thought and study.

¹ Hon. R. H. Dana, Jr.

The R. E. Lee.

THE R. E. LEE.

SEPTEMBER, 1866.

Six miles is the greatest distance at which the day signals of the navy can be read, under ordinary circumstances. In this case, five miles was taken as signal distance; and the alleged joint captors were decided to have been beyond that distance.

THIS prize was taken by the gunboat James Adger, off Beaufort harbor, North Carolina, on the ninth day of November, 1863, at about fifteen minutes past seven o'clock in the morning. Four vessels of the navy were lying in the harbor of Beaufort, and two of them, the Iron Age and Newbern, asserted a title as joint captors. The only question necessary to the decision of their right was, whether they were within signal distance of the James Adger at the time of the capture. The Iron Age made prompt and energetic efforts to get under weigh with her sails, but was foiled for some time by the strength of an adverse tide. As soon as possible she proceeded to sea; but it appeared that she did not reach the bar at the mouth of the harbor until a considerable time, probably more than half an hour, after the capture. Her anchorage was a mile or so above Fort Macon, and a somewhat greater distance above the bar, and near the Newbern. The other two vessels, the Viletta and Badger, were about a mile further off.

LOWELL, J. The first question is, what was signal distance on the day and at the place of this capture. In respect to night signals, I have lately had occasion to regret an apparently hopeless difference of opinion among naval gentlemen of skill and experience. With day signals, however, the case is otherwise. The evidence of the additional witnesses examined in the recent case of *The Cornubia*, for use in all these cases, is much more nearly alike on this subject than on the other. The question being how far these signals can be seen and read under the most favorable circumstances: Commodore Bayley says about four miles. Captain Jenkins says, they cannot be read with certainty, in his opinion, at greater distances than from five to eight miles. . . . If squarely seen by the observer, with a good glass, their colors may be defined with ease at the lesser of these distances, and probably at the

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maximum distance named. He afterwards mentions a particular station with which he was familiar, at which the usual distance of signalling varies from four and a half to five miles, and where, he says, they are seldom misunderstood. Captain Sands puts the distance, under the most favorable circumstances, at about six miles; and Lieutenant-Commander Quackenbush, at about five. In the case of *The Princess Royal*, in the eastern district of Pennsylvania, to which I referred in the decision of *The Cornubia*, the naval assessors reported that five miles may be considered the maximum distance at which these flags can be seen and read under ordinary circumstances. And in a case in the district court for the southern district of Florida, *The Alice Vivian*, Judge Fraser, sitting for the judge of the district, who had a disqualifying interest, rejected the claims of two vessels, one of which was supposed to be about eight miles distant, and from which the colors, hoisted by the capturing vessel and the boat boarding the prize, were said to have been distinctly seen. The foundation of this opinion was the evidence of experts, that signal distance, by day, is between five and six miles.

The fair result of all these opinions appears to be, that six miles must be considered the greatest distance at which the day signals can be read, under what may be called ordinarily favorable circumstances. But the evidence on both sides, in this case, is quite agreed, that on the morning of the capture of the R. E. Lee the state of the atmosphere was very unfavorable for seeing objects in the direction in which the James Adger and her prize bore from the asserted joint captors. Five miles is a liberal allowance for the purposes of this case, if six miles is a fair average distance.

The judge then examined, in detail, the evidence concerning the distance of the Newbern and the Iron Age from the place of capture, and decided that it was more than five miles, in the case of each of those vessels, and pronounced for the James Adger as sole captor.

R. H. Dana, Jr., district attorney, for the United States.

C. L. Woodbury, for the James Adger.

E. M. Felt, for the Iron Age and Newbern.

The Quintero.

THE QUINTERO.

JANUARY, 1866.

Where seamen shipped at Valparaiso on board a Chilian vessel and signed articles for a voyage to Boston and back to Valparaiso, they cannot by parol evidence vary the voyage shown in the articles, if the contract in this respect was fully explained to them before they signed it.

But they can avoid a clause in the articles which was not clearly explained to them, and which undertakes to forfeit all their wages and property if they should be absent from the ship for forty-eight hours without the express permission of the master.

Where, in such a case, the seamen left the vessel on her arrival in Boston, under a claim of right, and in ignorance of the penal clause of the articles; and upon learning that the master insisted on their return, offered to come on board and serve again, but were refused permission, and their absence had worked no injury to the owners, *held*, they might recover their full wages to Boston.

The wages should be reckoned in the money of the United States, the contract being for so many dollars payable here.

LOWELL, J. This is a libel by several seamen for wages. The ship Quintero, built and owned by American citizens, who have a branch house in Valparaiso, is navigated under a Chilian register for reasons arising out of the late war. The libellants allege that they shipped in this vessel in the month of January, 1865, at Valparaiso, for a voyage to Boston; that the ship arrived here on or about the 11th of June, and earned freight, and that they well and faithfully performed their duties. The answer by the master sets up a voyage from Valparaiso to Boston and back to Valparaiso, and that by the articles the crew are to forfeit all their wages and property for the benefit of the Charity Hospital, if they are absent for forty-eight hours without the express permission of the master, and that the libellants left the vessel at Boston without that express permission and so have forfeited their wages.

Soon after the vessel was safely moored in Boston the libellants went on shore, taking their clothes with them; they went back the next day, and for several succeeding days, to see the master and ask for their wages. The master referred them to the owners, who sent them back to the master, who then advised them to see the Chilian consul, who refused to interfere in any way, because they were not citizens of Chili. They continued to besiege the master

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daily, and on one occasion, some days after the libellants had first left the ship, one of them, in the presence of the rest, offered to the master to return on board and perform ship's duty, but the master refused to receive him back to duty or permit him to come on board the vessel.

The articles are in Spanish, and state the voyage and penalty for absence without leave, as they are alleged in the answer. In fact some of the crew are inhabitants of Valparaiso, and there is no doubt that they intended to return in the vessel. The libellants are all either Americans, or familiar with the English language, and all are ignorant of Spanish. They were engaged by a shipping master, and they all swear that the oral undertaking was for a voyage to Boston. And the first question is whether this evidence can be received to control the written contract.

There are many English decisions which establish that ships' articles are conclusive evidence of the voyage and the rate of wages agreed for. But these are founded upon the express provisions of the St. 2 Geo. 2, ch. 36, and those which have followed it. See *The Minerva*, 1 Hagg. 354; *The Prince Frederick*, 2 Hagg. 394. On the other hand, it has been decided that our statutes make the written articles conclusive for certain purposes only; and that in a suit in the admiralty, evidence may always be given that the voyage is wrongly described in them, for the reason that the law makes void articles which do not truly state the voyage; and from the necessity of the case their invalidity must be shown by evidence outside of the articles themselves; *Page v. Sheffield*, 2 Curtis, C. C. 377.

The present case is not governed by either of these classes of authorities, nor do they afford much analogy for its decision, because here both the vessel and the contract are Chilian, and the law of Chili upon this subject has not been given in evidence. The rights and duties of these parties must therefore be decided by the general maritime law, and the rules of evidence in their ascertainment will be such as this court is accustomed to follow in such cases, where no statute regulates them.

Now whatever may be the strict rule of the common law, I am by no means prepared to say that in this court a sailor, unable from any cause to read the contract which he has subscribed,

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might not be permitted to show that it differed from his oral engagement, upon clear proof that the written contract had not been read or explained to him, even without the element of positive fraud which probably induced the admission of such evidence in *Wope v. Hemmenway*, 1 Sprague, 300. But I am not satisfied that the libellants were ignorant of the voyage described in the articles. After a careful examination of the conflicting evidence, I am inclined to believe, though with some hesitation, that the voyage was explained in the hearing of the crew when they were called up to sign the articles; and that these libellants probably relied upon the undertaking of the shipping master that they should be discharged in Boston notwithstanding they might sign a contract binding them to a longer service. And I cannot think it safe to allow them now to engraft this condition upon the contract to which they then assented, in default of evidence of fraud.

When we come to consider the conduct of the men at Boston, a different question arises. There is no doubt that they performed their duty faithfully, and earned wages which they are entitled to receive, unless forfeited by subsequent misconduct. The only misconduct put in issue by the pleadings is an absence without leave, contrary to the shipping articles; but as the general question of desertion was argued, and an amendment of the answer would be readily granted, I shall consider the case in both aspects.

And I cannot for a moment doubt that the clause of the articles forfeiting all the wages and property of the crew upon an unauthorized absence of forty-eight hours is void. A court of admiralty will disregard such parts of any shipping contract as purport to limit the rights of seamen; unless, as some authorities say, it is clearly shown that the matter was fully and clearly explained to the men and freely assented to by them, with an additional compensation as a consideration for the surrender of part of their rights. Now this contract undertakes to establish a fixed arbitrary rule, applicable to all cases of absence, whatever the time, place, and circumstances, which may show much or little injury to the voyage, or excuse or extenuate the conduct of the crew, and without reference to the amount of the loss of wages and property to which it may subject them. Now these circumstances are proper to be considered, and are considered by courts of admiralty, and in

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recent times cases of total forfeiture of wages are comparatively rare ; *Swain v. Howland*, 1 Sprague, 424. It is not for the master to assume to abridge the power of the courts in this particular in his shipping contract. It is true that our statute has established a like arbitrary rule of forfeiture for forty-eight hours unauthorized absence ; but it has provided for a precise and contemporaneous entry in the log-book as the necessary evidence of the facts. The courts have always held this statute to be highly penal, and have required it to be strictly and accurately followed. Else they will examine and decide the case upon its merits ; *Cloutman and Tunisson*, 1 Sumner, 373 ; *The Phæbe*, 1 Wash. C. C. 48 ; *The Rovena*, Ware, 309.

In this case the evidence does not show that this highly penal clause was ever read to the libellants, or any of them, or explained to them. I believe one witness says that the articles were read over in English as well as Spanish ; but the weight of the evidence is that only some explanation was made of them by the captain of the port, himself, I suppose, a Chilian, and not one witness says that this part was so explained, though I doubt very much whether the mere explanation would have saved it. If we look upon it as a penalty to be chancered, which is as much as a court of admiralty could be expected to do for it, the result is much the same, and the case is left to the operation of the general law.

The only question, therefore, is whether the conduct of these men, in Boston, was such as to work a forfeiture of their wages, or a part of them, according to the general principles of law ; and, upon this point, we naturally look first to the evidence of the master. He says that he discharged and paid some seamen who had signed the articles, and would have done as much for these men if they had asked his leave before quitting the ship ; nay, that he would have done so as it was, but that the Chilian consul forbade it. It seems that he had reported them as deserters to the consul within a few days of the vessel's arrival, and, for aught that appears, before he had explained to one of them the effect upon their wages and property which he supposed would result from their conduct. I must be permitted to doubt whether the excellent and prudent merchant of this town who holds the consular office in question, ever assumed the jurisdiction to decide this case,

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at the instance of the master, which he had refused when claimed by the crew. If he did, his decision was made upon an *ex parte* hearing, and was probably founded upon some state of facts or of the law of Chili not in evidence here.

Upon the whole evidence, it seems the crew were acting under a claim of right, and it was the duty of the master to reason with and counsel them; but in fact they may, very probably, have been misled by his conduct, in discharging other men similarly situated to them, and in referring them to the owners and to the consul, thus implying that the difficulty was open to arrangement. This being so, the master had no right, when the crew, upon the precise controversy being understood, and, for aught that appears, as soon as it was understood, offered to return to duty, to turn round upon them with a forfeiture which he had all along intended to rely upon, as is shown by his early report of them as deserters to the consul. The evidence further tends to prove that the master did not really want the services of these men. The vessel has lain here ever since her arrival some months ago; and the owners have greatly gained by the dismissal of part of the crew. Whether this result was anticipated or not, I cannot say; but the appearance is, that, for some reason, the master was not desirous to retain them, though he was quite willing to make some money out of them, for what is, I doubt not, a meritorious charity at Valparaiso.

Upon the question of the intent of the crew, in their alleged act of desertion, the oral evidence may properly be looked into. And I decide that they had not the intent to desert a known duty; and that it was, under the circumstances of this case, incumbent on the master to take them back when they offered to return; and that the owners have suffered no damage by the conduct of the crew, but have gained by it. They are to have their wages to the time of the vessel's arrival in Boston.

Upon the amount to be recovered some question was raised. The contract was made in Chili, and an inference is said to arise from that circumstance that the crew were to be paid in Chilian dollars. But the contract is merely for dollars; and, upon the aspect the case has assumed, it is for dollars payable here, and the presumption must be that the place of performance of the contract is

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to be looked to in this particular. And whether the decree be strictly for wages or for damages in the nature of wages, it should be made up in our money. *Decree for the libellants.*

W. J. Forsaith, for the libellants.

J. C. Dodge, for the claimants.

THE D. M. FRENCH.

JANUARY, 1865.

Secret liens must be enforced with reasonable diligence as against *bond fide* purchasers without notice.

Where a vessel, owned in New Jersey, became subject to a lien for damage by collision, to a vessel owned in Boston, and afterwards came within this judicial district on three voyages, one of which arrivals was known to the libellants; and was then, nearly four years after the collision, sold to *bond fide* purchasers without notice: *Held*, that a libel *in rem*, filed four years and one month after the collision, was too late.

A sale by one of the original purchasers to another of them, of part of the vessel, pending the collision cause, will not affect that share with a liability to which it was not subject in the hands of the seller.

LOWELL, J. This is a cause of damage promoted by the owners of a ballast sloop against the schooner D. M. French, for a collision which took place in that part of the harbor of Boston called the Narrows, in August, 1858. The sloop was sunk and became a total loss, and her master and part-owner was drowned. The libel was filed in September, 1862. The case is one of great hardship for the libellants, who are poor; and if the facts of the collision are such as they allege, about which, however, there is much conflict of evidence, they would have been entitled to recover all their pecuniary losses by this disaster, in a court of admiralty, had their libel been brought in due season.

But they have applied to the court too late. A little more than four years had passed after the damage was sustained, before their libel was filed. In the mean time, and near the end of that period, the claimants had bought the schooner, for a full price, in good faith, and without notice of any liens, or any reason to suspect the existence of any. This is proved beyond controversy.

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It is the policy of courts of admiralty to require that secret liens shall be enforced within a reasonable time; and if this be not done it is at the risk of the lien-holder; and this for the same obvious reasons which have induced all nations to require the record or publication of liens, such as mortgages, &c., wherever this course is practicable. Where no injury would result from granting the remedy, and there is reason to believe that no evidence has been lost by the delay, the holders may sustain a suit after a very considerable period, even, in the United States, after the lapse of the time prescribed by the statutes of the State as a peremptory bar to similar actions. But when there is danger of injustice between the parties, or the rights of innocent third persons will be affected, the rule of diligence is held in its strictness. A rather striking case of this kind is *The Royal Arch*, Swabey, 269.

What is a reasonable time, must, of course, depend upon the circumstances of each case. As far as any general rule has been adopted it is, perhaps, that the lien will be presumed to be waived, as against innocent third parties, if a fair opportunity for its enforcement has not been availed of. See *The Lillie Mills*, 1 Sprague, 307; *The Eliza Jane*, ib. 152; *The Buckeye State*, Newb. 111. And so of a mortgage which the holder has neglected to record; *The Romp*, Olcott, 196. The cases in which the secret lien has been upheld after a considerable lapse of time, proceed upon the ground, that the first proper occasion has been used in prosecuting it; *The Mary*, 1 Paine, 180; *The Atlantic*, Crabbe, 440; *The Rebecca*, Ware, 188. No very exact line of distinction is adopted between the different classes of secret liens; but bottomry holders are expected, from the nature of their contract, to proceed with peculiar diligence; and a like rule would perhaps be applied to salvors, whose delay might seriously embarrass the necessary adjustment between contributory interests.

In this case the schooner was owned in New Jersey, and her name and that of her home port were painted on her stern, and were seen by two of the libellants; for though one of them desires to have it understood that he knew only the name of the town, but not of the State, it is apparent from other parts of his evidence that he must have been aware of that also. And the other

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libellant does not deny full knowledge. This schooner, thus owned in a town easily accessible from Boston by railroad, came to the port of Salem, in this district, on the voyage immediately after the collision. This fact was known to the libellants, and they sent a person to Salem to look for her. The evidence does not show what the agent did, or why he failed to effect a settlement of the damages, nor why this action was not entered at that time. Afterwards, and not long before the sale of the schooner, she brought a cargo to Fall River, and was there for six days; and she soon after lay at New Bedford for a like period.

Whether, with the modes of communication now within reach of every one, lien-holders might not be required to follow a vessel from Massachusetts to New Jersey, at the risk of losing their privilege, I am not called on to decide, because I feel bound to hold that these libellants have lost their remedy against the vessel in competition with innocent purchasers, by neglecting to proceed when the schooner was known to them to be within reach of the process of this court. See the cases above cited, and *The Admiral*, 18 Law Reporter, 91; *The General Jackson*, 1 Sprague, 555; *The Hercyna*, Stuart, Vice-Adm. Rep. 274.

It was proved that one of the claimants has, pending this suit, sold his interest to another of them, both having been, originally, *bond fide* purchasers, without notice. It was argued that, so far as this fraction was concerned, the present holder could not have the benefit of the rule in favor of purchasers. But the answer is obvious, that this suit depends upon the state of facts which existed when it was instituted. And this not only technically, but for reasons of substantial justice. The rule is well settled that a person who has bought in good faith, without notice of an equity, and thereby holds a good title, can convey an equally good title to any purchaser, whether that purchaser have notice of the equity or not. Story, Equity, § 1503 *a*. Were it otherwise, the title which the law holds good might be wholly valueless to the owner; for when any event has happened, which is notice to all the world, he could not sell at all.

The trifling discount which was allowed in this case, if any was allowed, which is not certain, stood for a sort of premium or guarantee of what the decision of this case would be. The

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price represented the value of the property in the hands of the seller, and not a supposed diminution of value caused by the act of selling.

Decree for the claimants.

C. G. Thomas, for the libellants.

H. A. Scudder, for the claimants.

THE LINCOLN.

JANUARY, 1866.

When one vessel drives upon another, which is at anchor in a proper position, the presumption is that the former is in fault.

It cannot be affirmed, as matter of law, that a vessel, coming to anchor in a harbor, is only obliged to swing clear of other vessels already anchored there. She is bound, if possible, to take up such a position as is prudent and safe under all the circumstances.

Where a brig was brought to anchor in the daytime, when the wind was blowing heavily and seemed likely to increase, ten fathoms astern of one schooner, and twenty fathoms ahead of another, and had cast, when so anchored, only half the scope of her chains, and, during the night, the schooner ahead fouled the brig, which dragged on the schooner astern: *Held*, the brig was responsible to the latter schooner, whether she was at all in fault for the first collision or not, because she was anchored too near the schooner astern.

Stated, she was too near the other schooner also.

The injured schooner should have had an anchor watch: but as the neglect to keep one did not contribute to the collision, she was decreed to recover her whole damage.

LEWELL, J. This is a cause of collision presented by the owners of the *Annie Magee*, a schooner of two hundred and twenty tons burden, against the *Lincoln*, a brig of one hundred and ninety tons, for the consequences of a collision which occurred in the harbor of Boston on the night of the second of November, 1861. The pleadings were filed, and some of the evidence was taken soon after the event happened: but the hearing was, for some reason, not brought on until lately.

The libellant's schooner, having discharged a cargo of coal in Boston, took up her anchorage towards noon, in the right of the line, from half a mile to a mile to the southward and eastward of Long wharf, and about half way between two schooners already lying there, of which the only one we are concerned with in this

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case, the Eliza & Rebecca, was directly to windward. The wind was blowing fresh from the east-south-east, and seemed likely, as all the witnesses say, to increase. It did, in fact, increase during the afternoon, and some part of the night, until it was blowing very heavily.

An hour or two after the schooner came to anchor, the brig, with a load of coal on board, was towed down from a comparatively insecure position near Rowe's wharf, and anchored between the Eliza & Rebecca and the Annie Magee directly to leeward of the one and to windward of the other, or very nearly so. Towards nine o'clock in the evening the Eliza & Rebecca and the brig were in collision, and the port anchor of the latter was lost, and presently after she drove down afoul of the Annie Magee and carried away her jib-boom, and was cleared and brought up nearly abreast of her. When the tide turned ebb, some hours later, the brig again fouled the schooner by swinging against her stern. So far the facts are clear.

The brig, then, having driven upon a vessel at anchor, a *prima facie* case is made out against her, and to exonerate herself it will not be enough to show a recent collision by which she was rendered unmanageable, unless it appears that she was without fault in that collision; and, besides, that the second collision was a necessary consequence of the first, and not caused in whole or in part by her fault or negligence co-operating with her first and innocent collision. *The Annapolis*, 5 Law Times (N. S.), 326;¹ *The Egyptian*, 8 ib. 776; *Secombe v. Wood*, 2 M. & Rob. 290; *The Christiana*, 7 Notes of Cases, 2; s. c. 7 Moore, P. C. C. 160; see *The Louisiana*, 3 Wallace, 164.

In this case, the claimants say that the collision, now in question, was caused solely by the earlier one with the Eliza & Rebecca, which was itself caused either by the negligence of the Eliza & Rebecca, or by the violence of the gale, and that, in either view, no fault can be imputed to the brig; and, finally, that the Annie Magee either caused or contributed to the misfortune by her negligence in not keeping an anchor watch. The libellants, on the other hand, allege that the brig was anchored dangerously near to both schooners, and is, therefore, responsible in this suit, whether the

¹ Lush. 376 n.

Eliza & Rebecca were in any fault or not; but that, in fact, she was not in any fault in the first collision, nor was their schooner in the second.

No *vis major* is proved. The gale does not appear to have been such as to drive a well-moored vessel from her anchors. We hear of no other disasters from drifting. All of the vessels whose history for that evening is given in evidence here, were riding securely, most of the time, at single anchors. Whether the Eliza & Rebecca dragged or not is in controversy; but if she did, it was only for a very short distance, and she was brought up instantly upon her second anchor being thrown over. The brig had but one anchor after the collision; and she appears to have been held by it; while, therefore, the wind was so strong as to be called a gale by several of the witnesses, it does not seem to have been of such great violence that no further cause need be sought for this misfortune.

To the contention of the libellants, that the brig was anchored too near the schooners, it is answered, by the claimants, in the first place, that, as matter of law, a vessel, coming to anchor in a harbor, is bound only to swing clear of other vessels, and that, if she does this, she is at a proper distance, and is not responsible for the dragging of her own anchors or those of other vessels, which is said to be one of the necessary risks of navigation, like those which arise from sailing on a dark night, or in a fog. No authorities were cited for this position, and I have found none. The rule of law I take to be, that vessels must be navigated with all reasonable precaution against the happening of accidents, and with all reasonable preparation to extenuate the consequences of accidents, when they occur, and, amongst others, against dragging. It is on this principle, that a vessel which had been well and carefully anchored, and was driven from her anchors in a very severe gale, and forced against another vessel, was held liable for the damage, upon proof that she had been left with no person on board during a night when the gale, which occurred, was evidently threatened. And this, not because any precaution would have prevented her striking adrift, but that the crew, if on board, might perhaps, by prompt action, have prevented its injurious results to the libellants' vessel; *The Lion*, 1 Sprague, 40.

And so are the following authorities: In the case of *The Vol-*

cano, 2 W. Rob. 337, Dr. Lushington, with the advice of the trinity masters, pronounced a steamer to be negligently moored because she had taken her berth at two cables' lengths, or two hundred and forty fathoms, to windward of the injured vessel. In another case, very like the present, the trinity master pronounced it bad seamanship to anchor so near to another vessel, directly ahead or directly astern, that in case of striking adrift there would not be room to bring up or shear the drifting ship without danger of collision; and such was the opinion, he said, of the writers on navigation. And the damage was pronounced for, although the immediate cause of the drifting was the breaking of a chain cable, concerning which the owners were not proved to be in any fault. *The Cumberland*, Stuart, Vice-Adm. R. 75. In a case before Judge Sprague it was held that one hundred and twenty-five fathoms directly to leeward was ample distance under the circumstances, and upon the nautical testimony of that case; and his judgment seems to imply that something more than swinging clear was required, although there was nothing like a gale existing or threatened. And the whole examination was conducted on the assumption that room enough must be given for the windward vessel to get under weigh; *The Julia M. Hallock*, 1 Sprague, 539.

No doubt this is in large part a question of seamanship; and if it were shown that the chance of dragging was so slight as to be practically disregarded by prudent and skilful navigators, the court might well hold that the precautions ordinarily adopted by such men under like circumstances would be sufficient in a given case. But the evidence does not go to that extent. The attention of the experts, in the case at bar, was chiefly directed to this question of distance, as applied to the relative positions of the brig and the *Eliza & Rebecca*. And I think it is the fair result of their testimony that, under the circumstances of night, and a heavy blow approaching, they would consider it more prudent to take up a greater distance, if possible, from a vessel already anchored to windward of them, than that of ten fathoms, assumed by the libellants to have been the distance at which the anchor was dropped by the brig to the leeward of the *Eliza & Rebecca*. It is true that some of these gentlemen seem to think that

as they would be in the leeward vessel and the risk would be chiefly theirs, they would be justified in choosing that position though unsafe ; but it is not easy to see how they could rightfully assume any risk for themselves without at the same time undertaking it for all others whose interests might prove to be involved in their imprudence ; and that is the very question here. Their evidence therefore appears to confirm the decisions, and to look to the question of prudence under all the circumstances as the test, and not merely swinging clear. So far as the fact of distance is concerned, I am entirely satisfied that the brig did drop her anchor at not far from ten fathoms astern of the windward schooner. [The judge here stated the evidence on this point.] It seems to me, therefore, that the brig was anchored imprudently near to the Eliza & Rebecca, and is therefore liable for the consequences to the libellants' vessel of the first collision, whether the Eliza & Rebecca were to blame in that matter or not ; concerning which it becomes unnecessary to inquire.

It is still more plain that the brig was too near the libellants' schooner, and it is upon this part of the case that I chiefly rest my judgment, though I have considered the other very fully because it was fully argued and rests upon the same grounds of law. After careful examination of all the testimony, I am convinced that the mate of the brig, who anchored her, and whose deposition, as already stated, was taken soon after the collision, and who on this point agrees substantially with the libellants' witnesses, allows all the distance the facts would warrant in his statement, that when he went ashore for the night, the vessels were about twenty fathoms apart. And I understand this estimate to refer to the hulls of the vessels, as it naturally would, and in which sense I accept it as tolerably accurate ; and of course the stern of the brig would be several fathoms nearer than this to the jib-boom of the schooner. Taking next the evidence of the respondents' witnesses, which are the most favorable to them in this particular, the brig had over not more than thirty fathoms of chain at this or at any time. It follows that she could not have given her anchors their full scope, if occasion should demand it, without fouling the schooner ; for that scope was sixty fathoms. It follows again that the brig did not swing clear of the schooner, if by that is meant

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that she would clear her when the brig had her full play of cable. And I should not readily decide that it is either the law or usage of the sea to require when a gale is approaching that the anchoring vessel should swing clear of others with only so much chain as may happen to be needed at the moment of anchoring, without allowance for further scope, and I do not see that that allowance can well be less than the whole of her supply.

My judgment upon this point is strongly confirmed by the fact that our coasters usually come to anchor by one anchor only, and expect to use the other when occasion may require; but this necessity may be developed suddenly, and in many instances is known only by the dragging of the first anchor, and it is obviously necessary to have some sea-room to bring up a drifting vessel, and although it is a question of skill in each case how much should be allowed, extending, it appears, to two hundred and forty fathoms in one instance, and being less than one hundred and twenty-five in another; yet I cannot think, as I have said, that it can ever be less than the full scope of the vessel's chains.

The evidence discloses a considerable probability, at least, that the accident here was substantially what I have last supposed, and that the only anchor which really held the vessel was carried away, and that she was brought up as soon as the second and larger anchor took firm hold of the ground. [The judge considered the evidence of this.]

I am therefore of opinion that the brig was anchored imprudently near to both schooners, and especially to that of the libellants, and is responsible for this damage in whole, or in part; for the evidence is full to there being ample room in the harbor that afternoon for the brig to have taken up a safer position.

The only remaining question is whether the Annie Magee is likewise in fault. She had no anchor watch; and the preponderance of the nautical evidence is that she was bound to have one under such circumstances, and I should have no doubt of it without evidence. If, therefore, I could see any reason to believe that the collision might have been avoided by any exertions or manœuvres which a wakeful crew upon the schooner could have adopted, I should require the losses to be divided. But the testimony is very clear that she could have done nothing. The

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brig was in much better condition to shear, because she was loaded and took more hold of the water, but she could not avoid the Eliza & Rebecca, though discovered at a distance which was probably equal to that between these two vessels. And there has been no evidence which has any tendency to show that this fault on the part of the libellants can have contributed, in any way, to the disaster. I must therefore pronounce for the whole damage.

Damage pronounced for.

H. A. Scudder, for the libellants.

J. C. Dodge, for the respondents.

THE MARENGO.

APRIL, 1866.

A part-owner of a vessel, dissenting from a voyage, and receiving a stipulation from the other owners for the vessel's safe return, is not entitled to compensation for the use of his part of the vessel during the voyage.

A court of admiralty has no jurisdiction of a claim by a part-owner dissenting from a voyage, for the use or destruction, during the voyage, of his share of the outfit. The remedy is in equity.

LIBEL FOR DAMAGES OR COMPENSATION FOR USE OF A VESSEL. —

In the year 1859, the libellant brought his libel in this court, and therein alleged that the respondents were owners of three-fourth parts of the ship Marengo, and were about to send her to sea on a whaling voyage, against the remonstrance of the libellant, who owned the remaining one-fourth part; and he prayed that his share might be appraised, and stipulation be taken in this court for its safe return: all which was done. At his request, his share of the outfits remaining on board the vessel from her former voyage was not included in the appraisement nor in the stipulation. *The Marengo*, 1 Sprague, 506.

The vessel made her voyage, and returned in safety to New Bedford, her port of departure, according to the exigency of the stipulation, bringing a very valuable cargo of oil; and this libel *in personam* was brought to recover compensation for the use of the libellant's part of the vessel, together with the value of such of the outfits above mentioned as were consumed in the course of the voyage.

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T. Parsons, R. C. Pitman, & W. W. Crapo, for the libellant. The law of England, which we have followed in this country, approximates the co-ownership of vessels to other commercial associations in this, that it gives to a majority in interest of the owners the right to control the employment of the chattel. A court of admiralty will, in their favor, dispossess the minority, or a master holding under and for them. If the majority, however, wish to employ the vessel in a way and upon a service from which the minority dissent, the court will require security to be given, as in this case, for her safe return. Story, Partnership, § 428; 3 Kent, Com. 152. So will a court of equity in cases not within the jurisdiction of the admiralty. *Haly v. Goodson*, 2 Meriv. 77.

It is upon this doctrine and practice that the libellant founds his claim to compensation. We say that the law which authorizes another person to use his property ought to require payment to be made for that use. It is like the taking of private property for public uses, which, by a principle universally admitted, and expressly sanctioned by the fundamental law of nearly every State of the Union, can only be done upon just compensation to the owner.

B. R. Curtis, T. D. Eliot, & T. M. Stetson, for the respondents.

LOWELL, J. The libellant contends that the law has taken his property, or required it to be taken for the benefit of the respondents. It would be more strictly accurate to say, that the law allowed the respondents to use their own property, or to dictate the use of the common property. The libellant's property happened to be, from its own nature, inseparable from theirs; but it may have been as great a hardship for them to be obliged to use it, involving, as such use must, an outlay and risk beyond their proper proportion, as it was for the libellant to have the vessel go upon a voyage which he did not approve. In the average of cases, it is equally probable that the majority would be embarrassed by the necessity of equipping and providing the whole vessel, as that the minority would be embarrassed by the necessity of providing for their part. It must be considered, then, as a difference of opinion between persons otherwise equal, excepting in their shares in the common chattel. The minority could hardly expect that their opinion should prevail; and the question then arises between

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the enforced idleness of the vessel, and her use according to the wish of the greater interest. The law says the latter alternative shall be adopted. The minority have full right to join in the enterprise, but refuse: the vessel sails at the sole risk and expense of the majority. Does it not logically follow that it shall be for their sole profit? This voyage happened to be successful: if there had been a loss, the libellant would not have shared it. What share shall he have in the gain? It is said that so much only is demanded as may fairly be due for the bare use of the libellant's fractional interest, after allowance for insurance and all other proper charges. The argument would be unanswerable, if the parties were strangers, and their property divisible; but in fact the compulsion and the hardship are or may be as great on one side as on the other. The respondents must either use the libellant's property, or let their own lie idle; and, to do this, they must furnish a capital, and assume a risk, proportionately greater than the use of their own fraction would require.

Again, the reason usually assigned for the rule is, that the free use and circulation of commercial property may be promoted. Now, if the majority owners are required to charter as well as to insure the whole vessel, it is to be feared that the burden will be too great, and that the contention would come to be, not who should employ the vessel, but who should evade this responsibility; and so the design of the law would be defeated.

The rights of a minority, indeed, are not fully equal to those of a majority, either in this or in other associations, whether social, political, or commercial. It is difficult to see how they can be made so. Perhaps, in this particular case, a law authorizing the sale of the ship under proper regulations might give the nearest approach to such equality. For in truth the actual hardship of their position comes chiefly from the fact that a small fraction of a ship does not readily find a purchaser. If it were as salable as the shares in any well-known stock company, the difficulty would be as nearly met as could be expected in a matter of this kind. But, whether this be so or not, I cannot believe that the remedy now sought to be applied would work fairly for the other owners. In theory of law, the choice is, as has been said, between the use and the idleness of the ship: if she is used, and the minority will

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not take their chances of the adventure, they are insured; if she were not used, they would earn nothing, and so they are not injured. Their rights are more fully protected than in most other similar cases. If they were partners or joint owners in a stock company, the majority could compel them to take the risks of any lawful enterprise. Here they have their option. That congress might well be asked to regulate this matter, I readily admit, for the rule does not seem so well adapted to modern voyages as to those of earlier times; but whether the regulation should extend to granting compensation, in all cases, to the minority owner, I very much doubt.

The weight of authority agrees with what I have supposed to be the true reason of the case. In an English case in chancery, decided in 1680, which brought up this point, the plaintiff was nonsuit. *Anon.* 2 Ch. Ca. 36. This action was taken upon consideration of a certificate of the course of the admiralty, made by Sir Lionel Jenkins, to whom this question was referred by the Lord Chancellor. See 2 Wynne's Life of Sir L. Jenkins, p. 792. The language of that learned judge is very explicit, as well as forcible. "I humbly submit," he says, "unto your lordship, that, in regard Mr. Clare was, according to the ancient practice of the admiralty of England in such cases, duly summoned, and admonished to contribute his quota as part-owner to the setting out of the ship, as the other part-owners did, and that he refused or at least neglected so to do; and that thereupon a due appraisement was made, and bail given by Mr. Newton, and other owners of the other parts, to bring back the ship, and consequently Mr. Clare's part in it, within the time limited in the acts of court for letting his part go out upon bail; or else, in case the ship should miscarry, to pay him the value of his part, as it stood appraised before its setting out, and that the said Mr. Clare's part was repaired, fitted, and set out in those voyages at the charge of the said other part-owners, — he, the said Mr. Clare, ought not, by the civil law, nor by the practice of the admiralty of our neighboring nations, nor particularly by the course of the admiralty in England, to have any share in the freight or any other profits made by the said ship in those voyages.

"If the law and practice in England were otherwise, it would be

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very mischievous to our shipping and navigation, the greatest part whereof being carried on by the contribution and joint power of part-owners, all partnership would cease, if a partner bearing no part of the burden should come to a share of the profits. Nor would there scarce any sea voyage go forward, if it were not in the power of the major part of the owners to overrule a cross-grained partner, and dispose of the whole ship," &c.

In a recent case, this doctrine has been re-affirmed, with the addition, that where the dissent was not notified until after the vessel had been repaired, and fitted for the voyage, the dissenting owner, though not entitled to any share of the earnings, must contribute his proportion of the repairs and outfits. *Davis v. Johnson*, 4 Sim. 539.

Although the point has not been directly decided in this country, yet the early case above cited is strong evidence of what the law was when our jurisprudence assumed a separate character. And the opinions of our jurists have generally coincided with the English doctrine. See *Billings v. Blight*, 2 Pet. Adm. 288; Story, Partnership, § 431; 3 Kent, Com. 152. And the course of practice and forms of stipulations in use here accord with this view. In a late treatise of acknowledged value, it is indeed suggested that the point is still open, and reasons are given in support of the position now taken by the libellant. 2 Parsons, Marit. Law, 558. In the present case I have had the great advantage of the able development and illustration of these reasons by the learned author, in argument at the bar: but I cannot persuade myself that the law is still unsettled; and upon authority, if not upon the reasoning of the case, I must decide for the respondents.

The claim of compensation for the use or destruction of outfits is beyond the jurisdiction of a court of admiralty. A court of equity is the proper tribunal for the adjustment of accounts between part-owners. *Kellum v. Emerson*, 2 Curtis, C. C. 79. It is true that the account in this case might be a very simple one, but that is not the test of the jurisdiction. The subject-matter is not within the cognizance of the court. The same objection would hold to the claim for earnings, considered as an item of an equitable account between part-owners. In undertaking to decide it, I have regarded it only as a demand for compensation in the nature of

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freight, due at all events, without regard to the issue of the enterprise, as upon a compulsory letting of the libellant's fraction of the vessel. If part-owners would be liable to make such a payment, it might be recovered here.

Libel dismissed.

THE ROBERT NOBLE.

APRIL, 1866.

A., a shipmaster, discovered a deposit of guano on an unclaimed island, and agreed with B. that the latter should charter a vessel, and assume the risk and expense of a voyage to test the value of the discovery; and that A. should command the vessel and conduct the adventure, and the two should share the profits in a certain proportion. B. chartered a schooner, and agreed to furnish a master, and the owners supplied the mate and three seamen. Several other persons were sent out in the vessel by B., and those of them who were seamen signed the articles, but only at nominal wages. C., the son of A., went out in the vessel, and upon her return, after the entire failure of the adventure, libelled the vessel for wages as an able seaman. It was proved that C. was represented by his father, upon the inquiry of the charterer, before the vessel sailed, to be a passenger; that he acted as such during the passage out; and that on the return trip he did all the duty of an able seaman. His name was signed to the ship's copy of the articles, as an able seaman; but when and by whom the name was written, excepting that it was after the copy had been put on board the vessel, did not appear. It was shown that C. knew of the contract between A. and B., and of the charter-party.

Held, that C. could not recover wages, because he had not proved the contract as alleged, and because his services must be taken to have been volunteered, with knowledge that the vessel was fully manned; and under such circumstances, would not be presumed to be worth more than the cost of his maintenance.

LIBEL of Francis F. Gregory, for wages for five months' service as able seaman, at twenty-five dollars a month. The schooner was hired by Mr. Nash, of Boston, for a voyage to the Island of Trinidad, in the South Atlantic Ocean and back to Boston, at an agreed rate per month; the charterer to furnish the master, and the owners a mate and three seamen.

Captain Gregory, the libellant's father, had discovered what he thought was a valuable deposit of guano, on the Island of Trinidad, a fact which he reported to Mr. Nash; and it was agreed that Nash should charter the schooner, and assume all the risk and expense of a voyage, to test the value of the discovery, and Cap-

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tain Gregory should contribute his knowledge — and his rights as finder as well as his time and skill in navigating the vessel, — and the two should share the net profits, in the proportion of two-thirds to Nash and one-third to Gregory.

The charterer engaged several men, upon the recommendation of the master. Some were seamen, or had a knowledge of seamanship, and these signed the articles, but only at nominal wages, perhaps to signify that they were to do ship's duty if required. Their contracts were not wholly maritime, and it would seem they neither had nor expected to have any lien on the vessel for their wages. The chief motive for engaging all these men was for work at the island ; and those who were not seamen were not expected to do any thing on board the vessel.

The libellant had been an ensign in the navy ; and his father testified that he should have taken him as mate, if his discharge from service had arrived in time. He came to Boston on the day the vessel sailed, and went in her. Mr. Nash swore that he asked Captain Gregory at the time, what his son was doing on board, and received for answer, that he was a companion for him, &c., and that he should make no charge for his services. The master did not remember any such conversation ; but the judge thought the charterer more likely to be right, because his attention was attracted by seeing a person on board whom he was surprised to see, and was likely to remember the explanation given him. The libellant, though counted perhaps in the second mate's watch, did not do regular ship's duty on the passage out ; did not take his turn at the wheel, nor stand his watches, but acted more like a passenger than a seaman, though he made himself useful by taking the sun, which is no part of a seaman's duty, and sometimes in other ways when there was occasion.

On the ship's copy of the articles the name of the libellant appeared as seaman, with wages at twenty-five dollars a month. The clerk who made the copy swore that this name was not on the paper when he made it out and gave it to the master, as the vessel was about to sail, and was not in his handwriting. Who made the signature of the libellant to this paper did not very clearly appear, nor when and where it was made. The libellant authorized his father to sign the articles for him, and he thought this was his

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father's signature ; but the father did not appear at all certain of it, and thought he might have asked somebody to sign for him.

There was no evidence of any vacancy to be filled by the libellant, but the contrary ; this was the only person who was not engaged with the full knowledge and consent, either of Mr. Nash or the owners ; and the only one whose signature was affixed after the paper left the counting-room of the owners ; and the libellant was the only seaman engaged for the charterer, whose wages were put down in the paper at more than a nominal rate.

C. G. Thomas, for the libellant.

J. Cutler, for the claimants.

LOWELL, J. The circumstances make out a strong case of concealment and underhand dealing, on the part of the master, and show that he never did make any bargain to fill a vacancy as the libellant expected and authorized him to do ; and neither the articles themselves nor the oral evidence, show any such contract as is set up in the libel. The only doubt is concerning the extent of the libellant's knowledge of the facts ; but whatever that may have been, his conduct shows that he either had not made such a contract, or that it was abandoned, for he did not do ship's duty on the outward voyage. There is some evidence that if the voyage had proved successful, instead of the disastrous failure which it was, the master and several of the men, with the second mate, would have stayed at the island, while the vessel made another trip. In this event, the master says he should have sent home the schooner in charge of the libellant, who is a good navigator. This statement, with the other circumstances, inclines me to believe that the libellant went out partly for the pleasure of the voyage, and partly with the hope of remunerative employment after the arrival of the vessel at the island. He has not proved the contract, and must recover, if at all, upon a *quantum meruit*. He certainly did full duty for about three months, with the master's consent, and this would, in most cases, be enough to make out his right to wages. But this case is by no means the usual one of the shipment of a seaman. The libellant knew the character of the adventure, and the general nature, at least, of the contract between his father and Mr. Nash ; he knew that the vessel was fully manned without him, and that his employment, at wages, after the project

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was found to be a failure, would work a fraud either on the owners or charterer. No doubt the master has full power to bind the ship to all such mariners as he may choose to employ, but no case has decided that such an engagement would hold good where the seaman, a man of intelligence and education, was fully informed that the master would be guilty of a breach of duty in employing him. In this state of facts, I cannot hold that the ship is bound to pay for more than the actual benefit received; nor that the benefit exceeded the cost of the libellant's maintenance. If the libellant did any work on shore, he must look to Mr. Nash, personally, for payment.

Libel dismissed.

WILLIAM C. PARSONS v. ISAIAH F. TERRY & AL.

April, 1866.

The master and co-owner of a whaling ship who has contracted for a cruise of four seasons at a certain lay, and is wrongfully deprived of his command at the end of three seasons, may have an action against his co-owners for damages for his removal.

The measure of damages in such a case is the probable value of his lay for the season in which he was about to enter when displaced.

A clause of the shipping articles, prohibiting the bringing on board ship of distilled spirits, is not broken by carrying molasses wine on freight.

LIHEL is *granted* by the late master, who was also a part-owner of the whaling ship *William & Henry*, of Fairhaven, against his co-owners. As originally framed, it included a demand for the libellant's lay as master for the voyage in controversy, but this ground of action was abandoned, and the cause proceeded as one seeking damages for an alleged act in depriving the libellant of his command before the end of his term of service, which was a long one. The owners sent out another master from home, who, at Fairhaven, in Peru, took possession of the vessel in the temporary absence of the libellant on shore; and the removal and the libellant that he would be displaced by there, if necessary, and he therefore retained possession of the ship, and came home, arriving

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in December, 1862. His engagement extended to one off-shore cruise or season beyond that time.

The respondents set up that the master was removed for due cause; if not, that no cause of action existed, because owners may remove a master at their pleasure; and lastly, that no damages could be given, because none can be ascertained with any legal certainty in regard to a cruise which never took place, and which might have resulted in a loss instead of a gain.

The master, after being out some three years, was obliged to put into Valparaiso for repairs; the owners did not receive his accounts for these repairs, and became alarmed by this and by some expressions in his letters, and determined to recall him. The master, in fact, took the usual course with his accounts, and they miscarried through some fault or accident not attributable to him.

LOWELL, J. I am unable to see in the letters of the master any thing that should alarm a constant mind. That he reports the price at which he can sell the vessel, and even that the price reported was less after the repairs than before, and says that if a power of attorney shall be sent him he can dispose of the vessel thus or so, cannot fairly raise the inference that he means to sell the vessel, whether power is given him or not, and run away with the money, especially as he had sent home the oil which was the most valuable property in his charge. Yet this is the inference the respondents say they drew from these apparently innocent letters. If they did, it must have been upon the report of what some other masters had done in those distant regions, and not on the face of this correspondence. But the great powers which they had intrusted to the master were as well known to them before he sailed as afterwards, and the appropriate time to consider whether they would run the risk was before his appointment. After the trial is made he must be judged by his conduct.

Upon a careful examination of his conduct in all its particulars,—and it was most fully disclosed in the course of the trial,—I am of opinion with the experienced shipmaster who went out to supersede the libellant, that the owners acted upon a mistaken and ungrounded apprehension, and that Captain Parsons's conduct is not open to the imputations cast upon it. And this I

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desire to say with emphasis, because the charges have not been retracted.

This being so, is the libellant entitled to any, and if any, what damages?

It is said to be one of the reserved rights of ship-owners to remove a master at pleasure, and so must be presumed to enter into their contracts as an implied condition; and the exercise of the right, therefore, will give no cause of action.

It is certain that this right is often exercised, though always, no doubt, as in this case, upon cause real or supposed, justifying the measure. And it has been thought that the trust reposed in the master is of so high a nature, and the interests of the owners are so important and overruling, as compared with his, that from motives of large policy, the appointment must be considered revocable. See 1 Bell, Com. Laws of Scotland, 412, No. 432. In the only reported case in this country which I have found, a court of admiralty refused to compel owners at the suit of the master, to perform their contract specifically and send him on the voyage against their wish, though he had signed the bills of lading and shipped the men. *Montgomery v. Wharton*, Bee, 388, and on appeal, 1 Dall. 49. But both the learned author above cited, and the court and bar in the reported case, say that the master could have an action for damages if his removal was without due cause arising out of his own conduct. And so is the law of England. The merchant shipping act of that country provides for a judicial investigation before a master is removed in the course of a voyage; and if the mode pointed out by the law is not followed, the master may have his action. *The Camilla*, Swabey, 312. The law of France gives large (*exorbitante* is the word used by M. Pardessus), though fixed damages, in like cases.

Mr. Curtis, in his treatise on Merchant Seamen, says the question is still an open one; but he himself concludes, after an examination of the authorities, and relying especially upon the weighty opinion of Valin, that by the general maritime law the owners may remove a master, but if they do so without good cause after an engagement for a particular voyage, they will be bound to pay him damages for the loss of his employment. Curtis, 165. Chancellor Kent does not discuss the point, but cites the opinion

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of Mr. Curtis without comment. 3 Kent, Com. (5th ed.) 162, note *b*. In the recent case of *Dennis v. Maxfield*, which will appear in the tenth volume of Mr. Allen's reports,¹ the supreme court of Massachusetts gave damages in such a case; but this point was not raised. So far as it goes it is in favor of the libellant. I have found no authority or *dictum* against him; and I can hardly see room for doubt at common law.

It appears to be the better opinion that, by the general maritime law, an action for damages can be sustained. We are not particularly concerned here with the extent of the owners' powers, but only with the master's rights. It may be that the owners can remove, and yet the master can claim indemnity. A person cannot ordinarily be held responsible in damages for the exercise of an undoubted right. Still there are such cases. The right of eminent domain, in some modes of its exercise, is a conspicuous example of this; for there exists on the one side a clear right to take private property for public uses, and on the other a clear right to be paid for the property taken. But however this may be, I am clear that this action can be maintained. The engagement of a master of a ship is not only an agency, but also a hiring of services. If the principals can revoke the agency, the employers must pay the servant his hire. The mere relation of principal and agent may be renounced by either party; but the master of a ship cannot lawfully desert her during the voyage; neither can the owners turn him out without compensation.

What is the measure of damages? Upon this point the above-mentioned case of *Dennis v. Maxfield* is explicit. The court there gave the plaintiff the sum which his lay would probably have amounted to. And I have no doubt this is the true rule. Courts are always reluctant to examine into conjectural damages, and where there is any standard or market price, will adopt it. For instance, if masters of whaling vessels were paid by the month, as other commanders of merchant vessels are, we should take the current rate of pay at the time, in the absence of express contract, rather than any more uncertain and contingent rule. But there is no such standard applicable to this case, and so we

¹ 10 Allen, 138.

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are obliged to ascertain what the contract was actually worth to the libellant, by discovering, as the jury did in that case, the average catch of vessels on that ground during the season, and calculating the libellant's lay accordingly. An experienced assessor will perhaps be as competent to arrive at the true result as a jury would be.

There is one other point of damages which was rather taken for granted on both sides than argued, but upon which a great deal of evidence was given; it is whether injury to the plaintiff's reputation can be considered in this action. From the consideration which, without a special argument or examination of authorities, I have given the subject, I do not see how that matter can be gone into here. This is not an action of slander, nor has this court jurisdiction of such an action. It is in fact, however the form may be, a suit for breach of contract; and damages are to be assessed on the same rule for the same injury whatever the form of action. As the point was not fully discussed, the libellant may, if he chooses, be heard further upon it upon the coming in of the assessor's report, upon notice to the other side that he shall bring it up at that time.¹

With regard to the allegation that the libellant has forfeited all his wages by carrying some casks of madeira wine, when the shipping articles prohibit the bringing distilled spirits on board the ship under pain of such forfeiture, I can only say that wine is not distilled spirits, and cannot be made so by a usage of the port of New Bedford, or any other process that I am acquainted with, except distillation.

Interlocutory decree for the libellant.

R. H. Dana, Jr., & T. K. Lothrop, for the libellant.

T. D. Eliot & T. M. Stetson, for the respondents.

¹ After a hearing on the assessor's report this view was adhered to.

J. G. PIERCE v. J. H. B. LANG.

APRIL, 1866.

When a moving vessel comes in collision, in the daytime and calm weather, with one that is moored in a fit place and manner, the presumption is that the former is in fault.

There is no rule of law, and appears to be no regulation of the harbor of Boston, which requires a vessel, lying wholly inside a dock, to have her yards braced up or cockbilled.

It appears to be usual for the master or person in charge of a vessel, which is to be moved near other vessels lying in the same dock, to give notice to the wharfinger who will see to it that all necessary precautions are taken by such other vessels.

Where a steamer was warped out of a dock in Boston, and came in collision with and damaged another vessel moored in the dock, and the steamer's men gave no notice to the shipkeeper of the injured vessel, nor to the wharfinger, before moving her: *Held*, the steamer was alone in fault, although the other vessel had her yards squared, and the collision was occasioned by this state of the yards.

LIBEL by the owners of the brig *Transit* against the owners of the steamer *Oriental*, for damage. The brig was lying at the head of the dock at Bartlett's wharf, in Boston, and the steamer in the corresponding position on the opposite side of the dock. The persons in charge of the steamer undertook to warp her down towards the harbor, and, while carrying out this operation, her foreyard came in contact with and carried away the brig's maintopsail yard, and scraped her hull. The defence was, that the brig should have had her yards braced up fore and aft, or cockbilled.

The evidence tended to show, that an ordinance of the city of Boston requires vessels, lying at the end of a wharf, which abuts on the channel, to keep their yards cockbilled and their jib-booms rigged in; but that, when they were lying wholly within a dock, they were, by usage, subject to the orders of the wharfinger, and that it was usual, at this wharf and many others, for vessels about to be moved to give notice to the wharfinger. No such notice was proved in this case, nor was it shown that any hail or other communication was had with the libellant's shipkeeper.

J. C. Dodge, for the libellants.

J. F. Barrett, for the respondents.

LOWELL, J. Upon the facts proved in this case, I must hold the steamer solely responsible for this collision. *First*, because the fact of a moving vessel, coming in contact in the daytime and calm

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weather with one lying at her dock, affords a presumption of negligence on the part of the former. *Secondly*, because it appears affirmatively, that the agents of the respondents neglected to give notice to the wharfinger and to the libellants' shipkeeper, or either of them, and gave no warning of any kind. *Thirdly*, the respondents are not shown to have neglected any usual and proper precaution in the mode of mooring and keeping their vessel. The ordinance does not seem to apply to ships lying wholly within a dock, and no usage is proved which regulates the subject.

Damage pronounced for.

DANIEL S. BABCOCK *v.* ISAIAH F. TERRY.

APRIL, 1866.

Where the contract between the master and owners of a whaleship was, that if the former should procure four thousand barrels of oil, or a full ship, he should have a lay of one-sixteenth, otherwise a lay of one-seventeenth, and the evidence showed that he brought home a full cargo, and that the ship was well stowed, but that the number of barrels was much less than four thousand, *Held*, the master was entitled to the larger lay.

Where the master after filling his ship with sea-elephant oil, left behind him at the island where the oil had been obtained some of his ship's company to pursue the business, and the owners afterwards sent out another vessel under another master and brought home the oil made by those men after the former master had left them, *Held*, that the former master could not claim a lay in that oil.

When the ship has not the means to cure a seaman who is taken ill on a whaling voyage, and he is cared for on shore, the reasonable expenses of his care and cure are chargeable to the ship.

The case of *Hazard v. Howland*, 2 Sprague, 68, followed in the matter of penalty on a master for bringing spirits on board the ship, and permitting them to be used there contrary to the articles.

The master of a whaleship has no right to charge a commission on the money paid out to the crew in the course of the voyage:

Where the master of a ship gave to another shipmaster, whom he brought home as a passenger, a receipt for \$150 passage-money, *Held*, that he was justly chargeable with the full amount, notwithstanding his testimony that he received only \$75, and gave the receipt for the larger sum "for the benefit" of the passenger, which the court understood to mean that the latter might be able to charge that sum to his owners.

WAGES.—The libellant was the master of the ship Samuel Robertson, of Fairhaven, on a voyage made several years since for whale and sea-elephant oil. The cause now came up on exceptions to the

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report of an assessor, and to settle certain points which had not been submitted to him.

The chief object of the voyage was to procure the oil of the sea-elephant or walrus, which was a new branch of industry when this voyage began, and had only been carried on from New London, out of which port the libellant had sailed as mate on a similar voyage. The sea-elephant is taken on shore at Hurd's Island, an uninhabited place which lies very low in the southern latitudes, and has a boisterous and uncertain climate. The animals are killed and stripped on shore, and the blubber is dragged and rafted to the beach and put on board a tender, to be carried to the ship and tried into oil, there being no anchorage fit for large vessels within about three hundred miles. Captain Babcock lost his tender on the day of her arrival at the island, and sent home for another, and in the mean time left his second mate and some of the men to catch sea-elephants, and himself cruised for whales, but without much success. When the new tender came out, the chase of sea-elephants was pursued with diligence, and the ship received a cargo and returned with it to New Bedford. The libellant left the new tender with a sufficient crew at Hurd's Island, making a new contract with them conditioned to be void if the owners sent out the same or any other ship. They did send out the *Arab*, under another master, and she made a voyage and brought home, among other things, fifteen hundred barrels of oil which had been made by the crew of the tender after the *Samuel Robertson* had sailed for home.

The libellant demanded a lay of one-sixteenth in all the oil brought home by him, and in the fifteen hundred barrels made by the men whom he left on the island; five per cent on sales of slops; five per cent on moneys advanced to the crew, and his whole disbursement account. The respondent disputed several items of the account; admitted a lay of one-seventeenth only in the oil brought home; and claimed a deduction from his lay for breach of the shipping articles by the libellant in bringing distilled spirits on board the ship at sundry times, and for negligence and want of skill. The facts on which the decision of these points depended are stated in the opinion of the court.

A. S. Cushman, for the libellant.

J. C. Stone, for the respondent.

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LOWELL, J. To begin with the master's general conduct. The evidence does not show that he was either careless or unskilful. He was certainly unfortunate in the loss of his tender, and in the small amount of whales taken in his off-shore cruise; but the preponderance of the evidence is, that these results were not owing to his fault. It was said that I must give greater weight to the evidence against him than to that in his favor, because the witnesses taken from the ship were reluctant to say any thing to his discredit. But after making whatever allowance I can discover to be due to apparent or probable bias, I must decide the case, after all, upon what the witnesses say, and not upon what they might have said had they testified differently. And the whole evidence convinces me that, excepting in the matter of distilled spirits, to which I shall recur presently, the master exerted himself with reasonable care and skill, and with rather uncommon diligence for the promotion of the best interests of the voyage. Upon the special matter of the slops, the assessor is satisfied that the master has duly accounted for them; and I see no reason to vary his award in that respect, nor to charge him with the value of certain articles stolen from the wreck of the *Alfred*.

On the other hand, I cannot allow the master a commission on moneys advanced to the crew. His contract expressly provides for the commission on sale of slops, but mentions no other; the usage of the trade is against it, and so is the reason of the thing. The commission on the sales is intended to compensate him for his trouble in making them, and to ensure his selling to the best advantage. The necessary advances to the crew are made as a part of a master's ordinary duty, and from the owner's money; the trouble is slight, and the responsibility nothing. I affirm the assessor's disallowance of the charge.

Nor can I allow the libellant a lay in the oil taken at Hurd's Island after he sailed for home. The contract made with the men whom he left behind, appears to have been carefully drawn, with the intention of giving the owners full control over this matter. They have seen fit to allow a lay in this oil to the master and crew of the *Arab*, who took it on board, and brought it home; and I cannot say they have acted unjustly. These men did a certain amount of work upon this oil, and are better entitled than those

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who came home in the Samuel Robertson to some share in its value. The libellant took the responsibility of the enterprise, and this may entitle him to some consideration from the owners; but he has no legal claim which a court ascertain and enforce.

The amount of the master's lay depends upon the construction of the special contract as applied to the facts of the case. It was agreed, that if the master procured on board the ship four thousand barrels of oil, or a full ship, his lay was to be one-sixteenth, otherwise one-seventeenth. The ship brought home somewhat over three thousand four hundred barrels, and the evidence is clear that she was full, and there is no proof that she was badly stowed. The respondent says that the ship did, on one occasion, bring a good deal more. He gives the number of gallons, by which it appears she had a little more than thirty-five hundred barrels, besides a considerable quantity of bone, said, in the argument, to be equivalent to some two hundred barrels of oil. It does not appear that she ever did or could bring four thousand barrels, or very near that amount.

Under these circumstances, it is fair to assume the libellant's construction of the agreement, and hold that he was to procure a full cargo estimated at four thousand barrels, more or less, rather than to say with the respondent, that the specification was intended as a *minimum*, and that the larger share was dependent on his getting at least four thousand barrels. The former construction, it is true, rejects the demonstration as false; but then it appears to be false. Such a contract should be construed against the owners in a doubtful case, because they are supposed to know the capacity of the vessel, which the master certainly did not; and it is not to be presumed that they would establish as a *minimum* an amount of cargo larger than the vessel was ever known to carry. Upon the facts in evidence, the respondent's interpretation gives scarcely greater weight to the words, "or a full ship," than the other does to the "four thousand barrels," because it is not credible that they could in any event expect the vessel to bring more than the specified amount. This point then, not submitted to the assessor, I must decide for the libellant.

The assessor has rejected the whole of the very large bill charged

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by the libellant for the expenses connected with the illness, death, and burial of Mr. Briggs at Mauritius. As it appears, however, that the ship was unable to furnish the proper medicines and medical attendance, which the unfortunate situation of the chief officer demanded, the master was right in boarding him on shore. And after examination of the account, I have thought it right to allow one hundred and twenty-five dollars as a fair charge against the owners on this account. *The George*, 1 Sumner, 151; *The Atlantic*, Abbott (Adm.), 451.

The next inquiry is, what penalty, if any, should be awarded for the breach of the article concerning spirituous liquors. And upon this, the case of *Hazard v. Howland*, decided by Judge Sprague in 1863,¹ is a direct authority. It was there adjudged that the owners have a right to say whether or not these liquors shall be used on their vessel for other than medicinal purposes; and further, that the penalty affixed by the articles, of a total forfeiture of wages, is one to be chancered by the court. In the present case the evidence is clear that the master wilfully violated this stipulation, and permitted his officers to have nearly as much whiskey as they liked. I must suppose that the discipline of the ship was injuriously affected by this laxity. What the actual pecuniary damage to the voyage was, it is impossible to say; and I shall deduct from the libellants lay the sum of three hundred and seventy-five dollars, which is the penalty imposed by Judge Sprague, in the case cited, and in which the master's lay was very nearly what it is here.

There is but one item of account remaining to be considered. The respondent produced before the assessor, a paper signed by the libellant, acknowledging to have received one hundred and fifty dollars as the passage-money of one Captain Proctor, from Mauritius to New Bedford. The libellant testified that he received in fact but seventy-five dollars for this service; that the price receipted for was the fair price of a first-class passage, to which Captain Proctor was entitled, but that the accommodations actually furnished him did not come up to that description, and the receipt was given "for the benefit of Captain Proctor." This means, I

¹ 2 Sprague, 68.

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suppose, that Proctor's owners were to pay for the accommodation he ought to have had, and Captain Proctor himself only for what he had. No doubt a receipt is open to explanation ; but I am not satisfied with this explanation, which appears to involve a fraud on the persons who were ultimately to pay the passage-money. The owners of the Samuel Robertson were entitled to receive all that Captain Proctor's owners were bound to pay ; it is not fit that one-half the money should be kept in the hands of the agents ; and I am unwilling to believe that this was done. If the master has undertaken to release Captain Proctor from any part of the amount due for his passage, he must settle that account with him.

The account then stands thus : [The judge here stated the account in conformity with the above opinion.]

Decree for the libellant.

THE ALBION LINCOLN.

APRIL, 1866.

Where five distinct sets of salvors took part in stripping and unloading a stranded vessel, they have not separate liens on the several articles saved by each set, but all are entitled to be paid out of all the property saved.

The award to each set of salvors who strip and discharge a wrecked vessel does not usually depend upon the value of the goods which each actually saved.

The value of the property saved is usually estimated at the time and place of salvage ; but where the salvors refused to deliver the property to the owners, and neglected to bring their libels until after the goods had fallen in market value, *Held*, that the price was to be ascertained when the libels were filed and the warrants to deliver executed.

SALVAGE.—On Wednesday, January 18, 1865, the bark Albion Lincoln, bound from some port in the West Indies for Portland, with a cargo of molasses, got on shore at Nashawena, an island at the entrance of Vineyard Sound, lying about fifteen miles from New Bedford on one side and Holmes Hole on the other. The vessel came off the rocks, but had lost her rudder, and was not in a condition to be navigated to a place of safety. Some men from the neighboring island of Cuttyhunk came on board, and were employed to pump. The mate went to New Bedford for assistance,

arriving there in the afternoon. Finding that no steamer was to be had, he engaged the libellant Baker, with his pilot-boat Dragonet, to go with him and tow off the bark. They were unable to reach the spot that night, but came to anchor at the nearest place of safe anchorage. Early in the morning, the master and crew of the bark came on board the Dragonet and informed them that the vessel had gone ashore again during the night, and was fast on the rocks. It was plain that the pilot-boat was not well suited to the service that would now be required of receiving the cargo from the Albion Lincoln. Captain Baker, however, was an experienced wrecker, and had vessels and men at New Bedford; and upon a representation of these facts to the master he agreed that Baker should go to work and save what was possible of vessel and cargo, and be paid a reasonable compensation.

In the mean time, the schooner Independence, belonging to the libellant Cromwell, of Holmes Hole, had arrived with a crew of picked men, accustomed to such service. They had heard of a vessel in the sound with her colors union down, and had come out to her assistance. Making a harbor of necessity the evening before, at Tarpaulin Cove, and arriving very early in the morning, they found the bark deserted. By inquiry on shore, they learned that the master was on the pilot-boat, and Captain Cromwell went to see him. What passed there was stated very differently by different witnesses; Captain Baker said he agreed with Capt. Cromwell to be jointly interested with him in the salvage. Cromwell denied this. There was no doubt, however, that Cromwell's assistance was accepted on some terms, and all went to work to strip the vessel, so far as was proper and prudent, to lighten her; this work, and the saving of five or six hogsheads of molasses, occupied the whole of that day (Thursday). Towards night, the master of the bark and his crew went to New Bedford with Captain Baker, in the Dragonet, intending to return the next day with two wrecking schooners, the Z. Secor and the Experiment, which belonged to Baker. They procured the vessels, manned them, and started, but were detained by ice, and could not reach the wreck until Sunday afternoon or evening. Monday and Tuesday were stormy; but on Wednesday, Jan. 25, Captain Baker saved some hogsheads of molasses. In the mean time, on the first Friday evening, the

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Emma Jane, a light-draft schooner, able to lie alongside the wreck, arrived, and Capt. Cromwell made a bargain for her assistance, and during Friday and Saturday these two vessels got out a considerable part of all the cargo that was saved. They saved something, though not much, on the second Wednesday and Thursday. Two other vessels, the Platten See and the Martin Van Buren, also saved some cargo. All this before Captain Baker's return. Captain Church, who came down with the first party on the Dragonet, remained during the whole time, and had some sort of charge of the vessel, but not a general supervision of the business. He worked chiefly with the men from Cuttyhunk, who remained during the whole time.

By Thursday night, January 26, or Friday morning, it was discovered that the molasses, which had been stowed with the bungs of the hogsheads out, as is usual in voyages from the West Indies, was so far mixed with water, that it was not worth saving, and all parties gave up the work.

T. M. Stetson, for Cromwell.

A. Mackie, for Baker & Church.

T. K. Lothrop & W. J. Forsaith, for the claimants.

LOWELL, J. Two libels are brought here. One by Captain Baker, for himself and the several officers and men of his three vessels, with whom joins Captain Church, for himself and the men from Cuttyhunk; the other by Captain Cromwell and Captain Cleveland, of the Independence and Emma Jane, for themselves and the crews of those vessels. It is said that the master and owners of the Platten See and Martin Van Buren have arranged with the owners of the molasses for compensation to be paid hereafter.

The sails, spars, and rigging, were taken to New Bedford, and sold by auction; the cargo was somewhat scattered, but was collected at Holmes Hole, and eventually sent to New York and sold. The net proceeds of the sale are about five thousand two hundred dollars. And upon this the question is made, what value I am to assume for the property saved. It seems that the market price of molasses fell very rapidly during the interval between the saving and the sale of this cargo; and the libellants say, this fluctuation of values is at the risk of the general owner. It is undoubtedly true,

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as a general proposition, that the value, at the time and place of saving, is to be considered rather than the value at any other time and place, because this shows the benefit done to the owner of the property, if he receives it then and there, whatever disposition he may choose to make of it: *The George Dean*, Swabey, 290. But in this case, the owners did not receive their property, and the salvors refused to let them take it, and brought their libel after the owners had begun to attempt its removal and had hired a vessel to take it to New York, and this was a long time after the goods had been landed. It is argued that the claimants are responsible for this delay. But the evidence does not bear out this contention. The underwriters' agents appear to have tried, in good faith, to compromise the matter, and to have made an offer which was entirely liberal; but a settlement was prevented by the conflicting claims and pretensions of the different salvors. At all events, no settlement was made; and down to the day the second libel was filed, the owners had not full possession of their property, and were not bound, personally, to pay any thing for its having been saved. If it had been destroyed at that time, no action could have been sustained against them for salvage, properly so called, though possibly something might have been recovered for actual expenses.

This state of facts raises the distinction between the present case and those cited at the bar, as, for instance, that concerning the conversion of a whale, decided in January last. In this case, there was no contract, and no responsibility for a specific part of the goods deliverable at the time and place of salvage; but only for such sum of money, or such part of the goods or of their value, as might be just and reasonable, and the parties could not agree upon that; but the libellants, being at liberty to apply to the court at any time, neglected to apply until the goods had fallen in value. If the court had then ordered an appraisement, or had decreed to the libellants a specific part of the goods, as is sometimes done, it is seen at once that the salvors would sustain their proportion of the loss, as it is right they should. I cannot hold the owners responsible for the value of goods which they were not allowed to take away.

The property was delivered to the claimants, by the marshal, on the 13th of March, and was sold in New York, early in April.

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Granting that it could have been as well sold at Holmes Hole, of which there is some evidence, it would be proper, in making the estimate, to disallow the expense of getting it to New York, and to take a somewhat earlier time; but a very considerable fall of prices had occurred before any proceedings were had. Upon all the evidence, I assume the value as about six thousand dollars.

The services performed by the salvors were meritorious, and at great expense of time. The cargo was under water during a part of each tide and the weather extremely cold, the thermometer, on several days, being at about zero of Fahrenheit; and, altogether, the difficulty and labor were very considerable. A great part of the time consumed, however, especially by Captain Baker and his men, was spent in trying to get an opportunity to work. The fund, reckoned on any fair basis, is small, not sufficient to allow of a large salvage reward to any one. This is one of the risks which wreckers take, however, and in the case of most of the libellants, who are often employed in the business, it may be supposed to be made up by the larger reward earned when the property is large.

Another question, much debated in this case, is the principle of the distribution of whatever salvage may be thought reasonable for the whole service. There are five distinct sets of salvors; and most of them have acted upon the theory that their lien and claim are upon the specific goods rescued by them; they put their initials on these casks, and stood guard over them and forbade their removal, have expected a definite part of them for their reward, and have, in one instance, filed their libel against them. This course of proceeding strikes me as novel. I have been accustomed to look upon the vessel, freight, and cargo, or what was saved of them, as one fund, upon the whole of which all the salvors, though not associated by any contract among themselves, had a lien for such sum as, upon the whole, was found due to each. In the case of the vessel and freight this is necessarily so, and I am not aware that any different rule holds with respect to cargo, or to the materials of a ship that has been broken up.

The success of the particular salvors, though often a necessary preliminary to the recovery of any reward, is but one element in determining its amount; there are others of great importance, such as the time and labor expended and the risk run. In some

reported cases one set of salvors have plainly contributed much more to the safety of the property, and the other set have been allowed as large, and sometimes the larger reward. Success is essential, but that having been obtained, the share depends largely on the nature of the effort: *The Santipore*, 1 Spinks, 231; *The Genesee*, 12 Jur. 401; *The Atlas*, 1 Lushington, 518; *The E. U.*, 1 Spinks, 63. As a general rule, the court will not assess a different ratio of salvage upon different parts of the property, according to the labor expended on those parts, though it may do so if the justice of the case requires it; *The Vesta*, 2 Hagg. 189. And the salvor who happened to find and rescue a very valuable part of the cargo would not usually be compensated in proportion to its value. It is only one of the elements of the computation. Take in this very case the instance of the men from Cuttyhunk. They were on board the vessel before she was bilged, and every day afterwards. It is impossible to say how far they contributed to save all that was saved by their exertions on the first Wednesday. They got out but little molasses considering their numbers, because they worked at the fore hold, from which it was difficult to discharge the cargo. But they had as good a right to work at the after hold as the crews of the *Emma Jane* and the *Independence*: any arrangement they may have made for a division of labor, was made, as I must presume, for their common convenience: and they appear to stand very much alike, except that Captain Church's men were able to sleep on shore with their families, and therefore were not subject to so much discomfort, which is a point of some importance: and they furnished no vessels or other appliances.

Coming to Captain Baker's case, we find that he employed nearly as many men as Captains Cromwell and Cleveland, and one more vessel: but he did not arrive in time to save a great deal of the cargo, and his men were not subjected to the same hardship or severity of labor.

I do not find that Captain Baker has made good his demand to share equally with Captain Cromwell, on the strength of a bargain with him to that effect. Even setting aside the express denial of the latter, the conversation reported by Baker hardly amounts to such a contract: and when I consider the various circumstances

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of the case which would render such an agreement improbable, and others which seem to show that the conduct of Cromwell was inconsistent with it, I cannot say that any such bargain was fully understood by him, however it may have been with the other party. But Baker's time, expense, and exertions are entitled to be considered in apportioning the salvage, just as Captain Cromwell's time, trouble, and expense connected with the shipping and care of the steam-pump are to be taken into account. They were all working for a common object, and to that extent are necessarily interested together, whether they intended to be so or not. It is not possible to say precisely how far each contributed to the whole result, nor precisely what one might have saved if the others had not saved what they did. It is upon these principles that I shall divide the salvage: and I am glad to find that, looked at merely as wages, it will not be entirely insignificant. The case does not require me to make distribution to the individuals, but only to the different sets of salvors. I shall decree to the Independence and Emma Jane, \$1500; to Captain Baker, for himself and his crew, \$600; to Captain Church, and the men from Cuttyhunk, \$350.

Decree accordingly.

JAMES LORWAY v. FRANCIS LOUSADA, *Consul*.

APRIL, 1866.

The district court has jurisdiction of a suit brought by an alien against the consul of his nation, residing within the district, to recover the amount of official fees improperly exacted.

The Act of Congress of 8 March, 1817, requires masters of British ships to deposit certain papers with the consul of his government within forty-eight hours of his arrival in a port of the United States.

It seems, that for receiving these papers, and recording the time of their reception, the consul may charge a fee.

There is no such statute requiring the consul to certify to a redelivery of the papers to the master.

ASSUMPSIT brought April 11, 1865, by an inhabitant of Nova Scotia, against the British consul, to recover back certain fees paid to him by the plaintiff under protest, in order to obtain

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his ship's papers from the consul ; and which fees, the plaintiff alleged, the defendant had no legal right to demand The defendant filed a plea to the jurisdiction of the court, to which the plaintiff demurred.

C. T. Russell, for the plaintiff.

C. G. Thomas, for the defendant.

LOWELL, J. This is a suit by an inhabitant of one of the British Provinces of North America against Her Britannic Majesty's consul at Boston, and the pleadings raise the preliminary question, whether an action will lie here, between these parties, to recover back an alleged excess of fees exacted by the defendant for an official service. Whether the facts would show that any overcharge has in fact been made, is not now the question ; but, supposing one to have been made, and that the payment was not such as the law would presume to have been voluntary, the point raised is, that no action can be maintained in our courts.

That foreigners, even transiently here, may sue and be sued by citizens and by each other in our courts of common law and equity, is now the better opinion, and is in accordance with the law of England. Story, *Conflict of Laws*, § 542 ; 2 Kent, Com. 64 ; Westlake, *International Law*, § 120 *et seq.* Such actions are constantly brought in our State courts, and this general practice meets the approval of jurists. A late French writer has said, that the other nations have just cause of complaint against France, in that her laws deny to strangers the right to sue each other in France ; a privilege which is allowed, he says, in almost all civilized countries. Foelix, *Droit. Int. Privé*, § 127, &c.

Courts of admiralty, it is true, exercise a considerable latitude of discretion in entertaining suits between strangers ; and they are guided to some extent in the particular case by the nature of the controversy, whether it involves a question of general law, or only of the local law of the foreign country. This distinction perhaps arose out of the great diffidence with which courts of admiralty in England were formerly accustomed to approach questions of local law, whether domestic or foreign. However this may be, it is now the better opinion, in this country at least, that where circumstances make it either necessary or highly convenient that the jurisdiction should be retained, as for instance

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when the voyage of a foreign vessel is broken up here, a court of admiralty will take the case, whether the law which it will be bound to administer happen to be local or general. In short, the question is one of discretion in the exercise of an admitted power, and not of the power itself. See, per Taney, C. J., *Taylor v. Caryll*, 20 Howard, 611; *The Havana*, 1 Sprague, 402; *The Wilhelm Frederick*, 1 Hagg. 138; *Patch v. Marshall*, 2 Curtis, C. C. 452; *The Jerusalem*, 2 Gallison, 191; Notes to 2 Parsons, Marit. Law, book 3, ch. 3. And the remark of Mr. Justice Curtis in *Patch v. Marshall*, 2 Curtis, C. C. 455, is to be understood, I have no doubt, in reference to a court of admiralty and its jurisdiction, which alone was involved in that case. One other assumption of fact was made by both parties at the argument, which was, that by the law of England, if an overcharge, such as is here alleged, had been made, and the payment was compulsory, an action would lie against the officer to recover the excess; and it has not been shown, that such an action must by the English law be brought in the home courts. Assuming this to be so, I am of opinion that such an action may be maintained here, there being no treaty provision to the contrary.

So far as the official character of the defendant is concerned, it has long been settled as the law of England and America, that consuls may be sued, and even arrested, for debt or damages. Wheaton, Int. Law, 423; 1 Phillimore, Int. Law, 240; and see Foelix, Droit Int. Privé, § 191; Massé, Droit Com., No. 446; Pardessus, Droit Com. No. 1448; *Davis v. Packard*, 7 Peters, 276. If the defendant owes a debt, however small, to one of his countrymen, it can be sued in this court. Is there any thing in the nature of this supposed debt to put it on a different footing? I am unable to see any such difference. All the reasons of propriety and convenience are the same. The defendant for many purposes has his domicile here, where the cause of action, too, arose, and where the witnesses may be supposed to be. Story, Confl. of Laws, § 69; Westlake, Int. Law, § 139. Indeed it is not easy to see how any effective suit could be maintained in any other forum. If the laws of England allow one of their consuls to be sued at home, while residing abroad, the service upon him must be made by aid of some local rule, allowing a substi-

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tuted if not a fictitious service ; and a judgment so founded could hardly furnish the ground of an action out of England. In the case of some not unimportant consulates, the office is exercised by our own citizens, who have neither real nor fictitious residence elsewhere ; and in other cases the controversies may arise with our own citizens. The rule of necessity in many cases, and of convenience in all, is plainly in favor of the jurisdiction here. It must be admitted, that the mere fact of the defendant being a consul is unimportant, because consuls are liable to suit ; nor is it more important that the plaintiff is a foreigner, for alien friends may freely sue in our courts ; nor that the plaintiff is a British subject, for he may have suit against his consul somewhere. And the only point strenuously argued was that a court here cannot or ought not to pass upon the proper exercise of the consul's duties. No doubt our government, in all its departments, is bound to accord to the consul, after the executive authority has received him, the free exercise of all his consular authority, such as may exist by custom, treaty, or general international law. But, after he has done an act professedly official, I see no reason why an individual may not try the question here, whether the act was within the scope of his authority. I perceive no greater objection to a court undertaking to construe the English law in a case of this kind than in any other in which it may be involved between party and party, nor any reason of comity that should forbid it. International comity is rather on the other side. All nations are supposed to desire that justice should be done between their own subjects, and international law does not in the case of consuls exempt them from the jurisdiction of the courts at the place of their residence. For these reasons I must overrule the plea to the jurisdiction. *Demurrer sustained.*

At a later term, the case was tried to a jury, and the evidence tended to show that the action was prosecuted at the request and expense of the government of Nova Scotia to test the legality of a small fee which the consul usually charged to provincial vessels. The whole overcharge declared for was fifteen shillings, agreed to be equal to \$3.63 ; but it was said that three thousand vessels a year were subjected to it in the port of Boston alone. It was made up

of two charges of seven and sixpence, for certificates of entry and clearance and the registration of them, of which the former was said by the defendant to be required by the laws of the United States, and the latter to be authorized by usage. The statutes and orders in council of Great Britain regulating the fees of consuls were proved on behalf of the plaintiff; and the defendant introduced evidence of a long established usage at Boston, New York, and Philadelphia, in his favor. The case was argued by the same counsel as before.

In charging the jury, Judge Lowell said : —

So far as this case turns on the laws of Great Britain, we must decide it merely upon the evidence before us, trusting that any mistakes we may fall into will be corrected by the official persons who may be called upon to consider the effect of our judgment upon the usages of the consul's office here and in other ports; for it is said to be rather for the examination of these usages than for the recovery of the very trifling sum at issue, that this action is prosecuted.

It is admitted that the sums of money now sued for were paid by the plaintiff, not only under protest, but under compulsion, in order to recover his ship's papers which were in the defendant's possession. This being so this action will lie, if the exaction was illegal. The laws and orders in council of Great Britain have been given in evidence, and you will decide (no question of construction being involved in the issue) whether the charge of seven shillings and sixpence is the lawful fee for each certificate of the kind given in this case, and whether such certificates are required to be given by those laws or orders. If you find no such certificates mentioned, your next inquiry will be whether the plaintiff made any such request in respect to the second certificate, as is mentioned in the order of May, 1855, to authorize services to be rendered which are not required by law. If you find either a request by the plaintiff, or a legal duty imposed on the consul, you will find for the defendant on this part of the case; otherwise for the plaintiff.

The first certificate stands upon other grounds more familiar to us. By a statute of the United States, passed March 3, 1817, 3 Stats. 362, and still in force, the master of every foreign ship and vessel must deposit his register and the clearance and other

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papers granted by the officers of customs at the port from which he came with the consul of the nation to which the vessel belongs within forty-eight hours of his arrival in an American port, and must deliver to the collector of the port a certificate from the consul that they have been so deposited; and this under a severe penalty. And the consul is not to deliver back the papers until the master has exhibited to him a clearance in due form from the collector of the port, and this under a penalty of not less than five hundred nor more than five thousand dollars. This right to make the consul the depositary of the ship's papers, is evidently regarded as a privilege, because the act goes on to say that it shall not extend to the vessels of those nations in whose ports our consuls have not a like privilege. Now it is argued to you very forcibly on behalf of the defendant, that a certificate thus required by our law, and which is necessary for the master in dealing with our custom-house, cannot be refused by the consul and cannot but have been required by the plaintiff, and that its registration was essential for the protection of both parties in fixing the dates of the transaction.

It is argued for the plaintiff, that the statute 17 and 18 Vict., ch. 104, § 279, commonly called the Merchant Shipping Act, requires of masters a deposit of papers in the hands of the consul, within exactly the same time of forty-eight hours after arriving at any foreign port, and that by the other laws and orders already referred to, the services of the consul, in respect to the deposit and redelivery of those papers, are to be gratuitous. This is admitted to be true; but it appears by inspection of that part of the Merchant Shipping Act, that the papers there referred to are wholly different from the register and other papers mentioned in our law, being those which relate to the crew, and that the law is looking to the due supervision by the consul of the relation between the master and the men; while our statute touches only those which show the nationality of the vessel and the legality of the voyage, and deals with what may be called the international aspects of the voyage. If this be so, the provision that the deposit of wholly different papers shall not be the subject of a charge, is, of course, immaterial. So far as our law is concerned, then, I rule to you that the first certificate is required to be given; and that the

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second certificate, namely, that the vessel has been duly cleared, is not required, and is useless for any purposes connected with our port or custom-house. You will apply this law to that of the foreign country, proved as a fact before you, and decide accordingly, under the instructions above given, whether these charges, or either of them, were lawful.

A good deal was said by learned counsel on both sides, about the reasonableness of the charges. It will not be necessary for you to concern yourselves with that question, if you find the case is provided for by the laws and orders given in evidence. If you find it wholly untouched by those laws and orders, and yet, that the services were rendered at the request of the plaintiff, he must pay what they were reasonably worth. But I think it my duty to say to you, that I see nothing in the evidence which would warrant you in coming to that conclusion in respect to the second certificate.

NOTE. — The jury found for the plaintiff for one-half the amount demanded; and in answer to a question by the court, said that the second certificate was not required by the law of Great Britain, nor given at the request of the plaintiff.

Judgment accordingly.

THE ELIZA'S CARGO.

JUNE, 1866.

Where, by the terms of a charter-party, the whole freight for a round voyage was to be paid on arrival at the home port, but one-half to be considered as earned on the outward voyage, the master on arriving at home was held to have a lien for the whole freight upon the goods shipped at the outward port for the account of an assignee for value of the charter-party, to whom the whole cargo, with a trifling exception, was shipped by order of the charterer, and under a bill of lading requiring payment of freight "as per charter-party."

LIBEL against a cargo of logwood brought to Boston from Aux Cayes, in St. Domingo, in the schooner Eliza, of Georgetown, in Prince Edward's Island. On the thirty-first day of January, 1865, the vessel was lying in Boston, and was then and there chartered by her master to Mr. E. Wheelwright, for a voyage thence to Aux Cayes and back to Boston, at twelve hundred dollars for the round

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voyage, of which only twenty-five dollars was to be payable at Aux Cayes, and the remainder on discharge of the cargo here. One-half the charter to be earned on delivery of the cargo at Aux Cayes.

Two or three days after the charter was made, and before the schooner sailed, the charterer obtained an advance of two thousand dollars from Mr. Wildes, the claimant, and as security therefor, assigned him the freight and charter of the schooner, together with her cargo, to be furnished by the charterer, consisting of logwood or other merchandise. Payment to be made on return of the vessel, or, if she should be lost or detained, in four months, with interest and certain commissions. It was not disputed that the cargo here referred to was the homeward cargo only. Orders were sent by Wheelwright to Labastille & Co., his agents at Aux Cayes, to procure a return cargo and ship it to the order of the claimant, which was done, and the master gave a bill of lading acknowledging its receipt from Labastille & Co., to be delivered to Wildes or assigns, he or they paying freight for said goods as per charter-party. This was all the cargo, excepting eight barrels of honey, of small value, shipped by a third person for a specific freight of one dollar per barrel.

The charterer had failed before the return of the vessel, and upon her arrival, Mr. Wildes, the claimant, tendered to the master a reasonable freight for the carriage of the logwood from Aux Cayes to Boston, but the master refused to deliver the goods until paid the full amount remaining due by the charter; and he brought this libel to enforce that demand.

H. C. Hutchins, for the libellant.

S. H. Phillips, for the claimant, cited *Perkins v. Hill*, 1 Sprague, 123.

LOWELL, J. By the charter-party, the libellant is owner for the voyage, and the master has a lien, as against the charterer. The point raised is, that he has waived it in favor of this claimant. As a general rule, the master would have no right to waive the lien, and in the case of a person having knowledge of the charter, could not do so: *Gracie v. Palmer*, 8 Wheat. 605; *The Salem's Cargo*, 1 Sprague, 389. Here it is said the master, who made the charter-party on which the libellant relies, must be presumed to have power to vary it, no limitation of his authority being shown. Assuming

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this to be so, the question is, whether such a waiver is expressed or implied by the bill of lading, or by the conduct of the parties.

The claimant had what is called an assignment of the homeward cargo, but it was of a cargo not in being, as such, when the assignment was made. He could acquire no title, either legal or equitable, to the logwood until it became a cargo by being laden on board the schooner; but the instant it was so laden, the master's lien attached to it: *Small v. Moates*, 9 Bing. 574; *Gledstanes v. Allen*, 12 C. B. 202. So that the lien has once attached against this cargo. It is not to be presumed that a master intends to waive his lien without some good reason being shown for such action, or some explicit contract, or some conduct inconsistent with its intended enforcement.

Looking first at the bill of lading, does the master thereby contract to deliver these goods for a reasonable freight, reckoned simply upon the service performed in respect to them? The charter-party does not provide for a distinct freight for the homeward voyage. The agreement that one-half the freight should be earned at the out port, is intended to regulate the rights of the parties between themselves and with underwriters of freight, in case of a loss of the vessel. One-half of the freight is put at risk on each trip. But the freight that is payable at Boston by the charter-party, is eleven hundred and seventy-five dollars; and it may well be said, then, this is what is payable "per charter-party," under the terms of the bill of lading. If it be said that this construction fails to give due effect to the words, "freight for the same," because payment is not wholly for the carriage of these goods, the answer is, that the claimant's construction leaves out of view the expression, "as per charter-party;" and so we are still to seek what is, upon the whole, the more reasonable construction, and the one most in accordance with admitted principles.

And here the ship-owner's ground appears to be the stronger. It is usual for the master to give the charterer a bill of lading for his goods, and this is deemed to be subordinate to the charter-party, and not to enlarge or diminish the rights thereby created, so far as owner and charterer are concerned: *Lamb v. Parkman*, 1 Sprague, 353. If this cargo had been shipped directly to Wheelwright, the master would probably, in the usual course of trade, have given him precisely such a bill of lading as is here

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relied on; and it could not have been maintained that he thereby bound himself to receive any less sum than the charter-party entitled him to receive at the home port. Can it be said that the assignee of the charter-party is entitled to a more liberal construction of this paper? I have discovered no equity in his favor upon which to found such a distinction. He is not a *bond fide* purchaser of the cargo without notice, but a purchaser of the charter-party itself, and must be affected with a knowledge of its contents. Under these circumstances, the master gives the usual bill of lading, which is of value to the claimant in many respects: as evidence, for example, of a legal title to the goods, as well as a receipt binding the master and owners; but when its terms are ambiguous, it must be construed according to the existing rights of the parties, and in favor of the existing lien.

The case of *Perkins v. Hill*, 1 Sprague, 123; 2 Woodbury & M. 158, was much relied on by the claimant. We have no report of Judge Sprague's final decision in that case, but are told in a note that the decision which is reported was reversed by the judge on a rehearing, in which new facts were presented. By the report of the case in the circuit court, where the final and unreported decision of this court was affirmed, it appears that these new facts were many and important. The result in both courts was, that a shipper of outward cargo, whose dealings were with the charterer, and who had accounted to him, was not bound to pay freight to the owner of the vessel by reason of having taken a bill of lading, referring to the charter-party, when, by the terms of that instrument, no freight was payable for outward cargo. That case did not decide that freight payable as per charter-party means that no freight is payable, but that where, upon reference to the charter-party, it appears that none is payable, the charter-party rather than the bill of lading may, in some cases, prevail, and the whole clause concerning freight in the latter may be rejected. The claimant here desires, in opposition to that doctrine, to overrule the charter-party by the bill of lading, the greater by the less, and that without showing any inconsistency between them, unless it be in a construction of the very clause which in that case was rejected. If we follow that case implicitly, and give no effect to the controverted part of the bill of lading, the lien remains good, and the libellant must prevail.

Potter et al. v. Whitney.

Independently of the presumptions in favor of the lien, the construction of the bill of lading, which the claimant asks for, appears somewhat forced and over-nice. If the master had intended to deliver this cargo for any sum less than his remaining charter-money, he would probably have expressed himself so, and have stipulated for a specific freight, as in the case of the eight barrels of honey. An agreement for a reasonable freight is unusual, inconvenient, and unmercantile; it may be necessary to infer such an agreement in some cases, as in such an one as appeared on the first hearing in *Perkins v. Hill*, but I see no reason for saying that this is one of them.

Decree for the libellants.

CIRCUIT COURT.

ORLANDO B. POTTER ET AL. v. WASHINGTON WHITNEY, *in Equity*.¹

MAY, 1866.

As a general rule, if the plaintiff in a patent case in Equity has made out a clear title, and the question of infringement presents no difficulty, an injunction will be granted.

The hearing is had upon *ex parte* affidavits, and if the questions are difficult and complicated, especially if they involve disputed facts which have never been passed upon by a court or jury, then, although the court may be inclined to think the complainant is right, yet it will not interfere at this stage of the cause, whether the questions relate to title or infringement.

And even where the title is clear and the infringement clear, yet if there are peculiar circumstances which show that the defendant's interests would be very injuriously affected, while those of the plaintiff would not be so affected, an injunction may be refused.

There is always an element of discretion entering into the consideration of the question, and all that a complainant is entitled to is the best judgment of the court upon a question of judicial discretion, and not to an absolute injunction on any given state of facts.

Although it is the duty of the judge in every case of this nature, where the defendant has not been a party to any former suits, to examine the case anew, and to exercise his discretion upon the questions presented, yet when the questions are in fact the same as in the former cases, he cannot but admit those decisions as having great weight,—as much as in any other case in which the point in controversy has been passed upon and decided.

Maynard's primer would not be likely to suggest even to an ingenious mechanic, and did not in fact suggest to Wilson his improvement, and the latter was patentable notwithstanding the prior existence of the former.

¹ The headnote is taken, by permission, from Fisher's Patent Cases, vol. iii. p. 77.

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THIS was a motion for a provisional injunction, to restrain defendant from infringing letters-patent for "improvement in sewing-machines" granted to Allen B. Wilson, November 12, 1850, reissued January 22, 1856, and extended for seven years from November 12, 1864. See *Potter v. Holland*, Fisher's Pat. Cases, vol. i. 382.

The defendant was manufacturing and selling single-thread sewing-machines, in which the cloth was advanced by a sliding presser foot, provided on the lower side with serrations pressing the cloth against the table or platform on which it rested.

The facts sufficiently appear in the opinion of the court.

B. R. Curtis, George Gifford, & E. L. Sherman, for complainants.

Joel Giles, F. A. Brooks, & L. A. Jones, for defendant.

LOWELL, J. The principles which govern courts in granting or refusing preliminary injunctions in patent cases are well established. As a general rule, if the plaintiff has made out a clear title, and the question of infringement presents no difficulty, an injunction will be granted. The hearing is had upon *ex parte* affidavits, and if the questions to be decided are difficult and complicated, especially if they involve disputed facts which have never been passed upon by a court or jury, then, although the court may be inclined to think the complainant is right, yet it will not interfere at this stage of the cause, whether the questions relate to title or to infringement. And even when the title is clear, yet if there are peculiar circumstances which show that the defendant's interests would be very injuriously affected by an injunction, while those of the plaintiff would not be so affected by refusing it, it may be refused. Such were the cases of *Howe v. Morton*, Fisher's Pat. Cases, vol. i. 586, decided by Judge Sprague, and the burring-machine case, *Morris v. Lowell M'f'g. Co.*, Fisher's Pat. Cases, vol. iii. 67, which came before me; in both of which the patent was about to expire, and the defendant's business would be very seriously interfered with for the few weeks that the exclusive right would remain in force, only to be resumed again immediately afterward at great expense and loss. There is, therefore, always an element of discretion entering into the consideration of this question, and all that a complainant is entitled

to is the best judgment of the court upon a question of judicial discretion, and not absolutely to an injunction on any given state of facts. The present case does not present any peculiar features of hardship, nor any difficult question of infringement, and depends only on the validity of the patent.

These cases being tried, as I have said, on *ex parte* evidence, must be decided on broad views of the rights of the parties. It is usual to present proof, either of long and general acquiescence in the plaintiff's exclusive rights, or of their having been sustained by the courts. The ground on which acquiescence is important is that it shows exclusive possession, which, if it has been of long standing, open and notorious, is a clear foundation of a presumption of title. It is not always, however, so satisfactory as positive adjudications, because it may have arisen from the comparatively small commercial value of the invention, and in that case shows only that no one has thought it worth infringing.

In the present case it is in evidence, and is not denied, that very many suits have been brought upon this patent, every one of which has been decided in favor of the patentee. Two of these, one at law and one in equity, were carried as far as they could be carried in the circuit courts for the second circuit, and a final judgment and decree were given upholding the patent. Of the numerous injunctions, many were granted after argument and careful deliberation.

I cannot say that this extensive litigation shows a general acquiescence in the inventor's rights, excepting in the sense that the decisions of the circuit courts have been acquiesced in; but the result of the suits shows a great unanimity of opinion among many judges, including the presiding justice of this court, in favor of the patent.

Although it is the duty of the judge in every case of this nature, where the defendant has not been a party to any former suits, to examine the case anew, and exercise his discretion upon the questions presented, yet when the questions are in fact the same as in former cases, he cannot but admit those decisions as having great weight, as much as in any other case, arising, for instance, in admiralty or at common law, in which the point in controversy has been passed upon and decided.

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Upon a careful examination of the case and of the several opinions furnished by counsel, I am not prepared to say that I dissent from the conclusions reached in those cases. One new point has been raised before me, founded upon a machine not given in evidence in any former trial, and which, it is argued, anticipates the plaintiff's invention. This is the Maynard primer, a patented improvement in guns and pistols. On examination of that machine, it appears that Maynard pushed forward his priming paper or pasteboard in a mode which bears a considerable resemblance to the feed-motion by which the plaintiff advances cloth to the needle in his sewing-machines. But the contrivance, as found in the fire-arm, is combined with two devices essential to the proper operation of that machine, and the absence of which is essential to the operation of the plaintiff's machine.

If the holding-spring and the channel are both removed from the primer, it is useless as a primer, but might probably feed cloth; but Maynard never did remove them; and it is shown that his contrivance would not be likely to suggest, even to an ingenious mechanic, and did not in fact suggest to Wilson his improvement; and even if it had, I cannot see why the new arrangement would not be patentable. The third claim of this patent has been repeatedly held to be good, notwithstanding the earlier patent of Howe; but as this point has been re-argued with a good deal of earnestness, I may say, that it appears to me, that Howe's feeding surfaces are not substantially like those of Wilson, because his bar "X" aids in the feeding, so far as it is a stripper, but no farther, while Wilson's upper surface assists in moving the cloth forward as well as in stripping it.

Under our practice, the defendant in a suit in equity upon a patent, can bring the case to final hearing; and, if the decision is against him, can appeal to the supreme court. It was intimated at the argument, that this defendant might desire to avail himself of this right. He can do so, of course, and is not precluded nor prejudiced by the fact that other defendants have not chosen to do so; and it may be that he can show a different state of facts, or obtain a new construction of the patent on the final hearing here. But, as the case now stands, he does not deny the validity of the second claim of the patent, nor that he has infringed that claim;

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and the only ground on which he defends against the injunction, is that the other three claims are too broad, and ought to have been disclaimed or limited by the patentee or his assigns; and that until this is done, an injunction should not be granted for an infringement of the valid claim; and that if the patentee has unreasonably neglected to do this his patent is void.

I do not think that these claims are too broad; but even if I did, I should hesitate to say that the patentee had been negligent in filing a disclaimer, in respect to a patent which has been repeatedly and uniformly upheld by the courts.

Upon the case as presented, I must grant the application.

Injunction ordered.

DISTRICT COURT.

THE GEORGIANA.

MAY, 1866.

The doctrine is now well established in courts of admiralty that the salvors of derelict property stand on the same footing as other salvors, although in estimating the peril from which they have rescued the goods, the fact that they were derelict on the high seas is of great importance, because the chance of recovery by the owner is very small.

This peril depends more on the actual situation of the saved property, than on the intent with which it was abandoned.

Where a vessel of small value was found derelict on the high seas and towed into port by a vessel of much larger value with a valuable cargo on board, without great personal risk or labor, two fifths of the gross proceeds of sale were awarded as salvage, together with some necessary expenses and costs.

Distribution of this salvage between the owners and the men.

LOWELL, J. The brig America of — tons burden, and valued at about twenty thousand dollars, with a cargo the cost of which is not given, and manned by ten persons including officers, in the course of her voyage from Halifax to Boston, on the twenty-ninth day of March, 1866, at about seventy miles from Cape Ann, namely, in latitude 42° 37', and longitude 68° 58', saw the schooner Georgiana drifting with her sails loose and dragging overboard, and her main-boom swinging. The appearance of the schooner was such as to attract attention, and the master of the

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brig went some two miles out of his direct course to speak her, and found, as he expected, that there was no person on board. He lay to in a convenient position and sent his mate with five men to board the schooner. The roughness of the sea made it impossible to approach her with safety on the weather side, and this with the danger from the sails and other hamper which were dragging on the lee side, rendered the attempt to board her at all one of considerable difficulty and some danger, and one which succeeded only after persevering efforts, continued for about an hour and a half. Upon boarding the schooner it was found that she was in ballast and had apparently broken from her moorings; for both anchors were gone and both chains parted; her foresail was so much damaged as to be of no service; but it appears by the evidence that she was otherwise staunch and in good order. The mainsail and jib were at once hoisted, a hawser was passed on board from the brig, and she was towed for some two hours, when the line parted, and she was again taken in tow and so continued until some time in the following night, about twelve hours in all, when they had nearly reached Cape Ann, and the wind having died away, the master was afraid of the vessels fouling each other, and cast her off, and both vessels proceeded to Boston, but no longer in company. The value of the schooner, as proved by the marshal's sale, is nineteen hundred and fifty dollars, which is considerably less than the libellants supposed it to be. It is said that the owners were the purchasers, and no complaint is made that the sale, which was by agreement of parties, was not a fair one, and I must assume it as the basis of my judgment so far as value is concerned.

The answer, which is by an agent, upon information and belief, raises no issue except as to the value of the property saved, and the amount which ought to be awarded to the salvors, and as incidental to this, whether the schooner was derelict. It alleges that she was anchored in a small harbor on the coast of Maine, and in a gale the chains parted, and the captain and crew took to their boats and went on shore, intending, however, to return and retake the vessel, and that they made some efforts in this behalf. No evidence was offered by the claimants in support of their allegations; but taking the answer to be true, it is plain that the

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schooner was derelict in the ordinary sense of the law of salvage, that is to say, she was left and found under circumstances which show that the possession of her by her crew was not continuous, and that any hope they may have entertained of recovering her must have had very slight foundation in fact. This question of derelict vessels and goods at sea has been much discussed, and there are many cases in the books upon the subject. I understand the modern doctrine to be that there must be not only a hope of recovery, which indeed the law will always presume, but some reasonable prospect that the hope may be realized, to rebut the presumption arising from the condition in which the goods are found. Where the peril is such as to force an abandonment of the ship, the mere intention to return and recover her, if possible, will not prevent her being considered derelict: *L'Esperance*, 1 Dods. 46; *The Coromandel*, Swabey, 205; *The Sarah Bell*, 4 Notes of Cases, 144; *Rowe v. Brig* —, 1 Mason, 372; *The Boston*, 1 Sumner, 328.

The question is not quite so important now as it was formerly thought to be, because the finders in such cases are no longer considered to be entitled *prima facie* to one-half or any other fixed proportion of the property; but the courts are inclined to fix the reward rather by a consideration of the danger, labor, value, and other circumstances which govern in ordinary cases of salvage service: *Post v. Jones*, 19 How. 150. It is very rare indeed that more than one-half the value of the property saved is awarded.

There are two circumstances, however, which are usually found to exist in cases of vessels or other goods found abandoned at sea, which entitle the salvors to favorable consideration. One is, that the owner's chance of recovering his property is commonly very slight; and the other, that the salvors have not the aid or directions of the owner or master in relation to the measures to be adopted for its preservation. Besides these circumstances, there is not much in the present case to call for a very large reward. Though there was some danger in boarding the vessel, yet from the time she was in possession of the salvors their task was neither difficult nor dangerous. She was navigable and was not leaky, and the taking her in tow appears to have been more

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a matter of convenience than absolute necessity. The total detention of the brig's voyage cannot have exceeded two or three hours, for she appears to have made Cape Ann in about twelve hours from the time of taking the schooner in tow, which shows a rate of sailing of about six miles an hour. Indeed the master estimated the retardation, if it may be so called, of his brig by the tow at only about a knot an hour, which gives rather less than two hours as the total delay. A good deal has been said concerning the insurance of the brig having been vitiated by the deviation, and this is a point which has been thought by many learned judges to enhance the owner's claim. See the Boston above cited. On the other hand it was said in argument, that the latest doctrine in England is to consider all vessels in such cases as uninsured: *The Deveron*, 1 W. Rob. 180, and unpublished cases cited 2 Pritchard's Dig. 835; *Salvage*, 690. If a general rule is to be adopted, it is certainly more in accordance with the truth to assume all vessels to be insured than the contrary. And I should assume in the absence of evidence, that the vessel and cargo are put to some additional risk by the deviation. In case of cargo not belonging to the owners of the vessel, it cannot be doubted that the latter may be incurring a great risk by such a deviation, because they become insurers, and it might often be the duty of the master not to take such a risk where the comparative value of the derelict property to that under his charge is small. In the present case the question is not very important, because the theoretical risk, by deviation, was slight, the vessel being near the end of her voyage. It was not worth a large sum to insure her for twenty-four hours. So far as any actual risk was encountered by the brig, that is always a subject of consideration by the court, and whether that risk is taken by the owners or the underwriters is of no consequence. That a valuable vessel has been endangered by a towage or other salvage service, is as proper an element in the computation of the reward, as the number of the salvors and the risks and hardships to which they have been exposed. The owners of the derelict property cannot object to this, because the question with them was whether their goods should be saved by risking this valuable instrument or not saved at all. It is not for them to complain of the means by which their property has been rescued. Taking into view the

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comparatively small value of the schooner, and that the risk and hardship of the salvors were not considerable, although the peril from which they saved the property was great, I have thought right to award two-fifths of the gross amount, or seven hundred and eighty dollars to be divided as follows : to the owners of the brig, one-third, \$260 ; to the master, one-sixth, \$130 ; to the mate, one-twelfth, \$65 ; to the second mate and crew, five-twelfths, to be divided in proportion to their wages, \$325.

The bill for expenses, \$47.50, appears to be proper, and this and the taxable costs are to be allowed out of the remaining three-fifths.

R. R. Bishop, for the libellants.

G. E. Betton, for the claimants.

THE DEER.

1866.

A court of prize has power to give salvage in lieu of prize-money to persons not of the navy, who have rendered valuable service in making a capture.

Four per cent of the value of the prize and counsel fees granted to two persons who made known the rebel signals, and thus enabled the naval officers to make the prize.

PRIZE. — Two men, who had escaped from Charleston and given themselves up to our fleet, made important disclosures concerning the signal lights used by the rebels, and thus enabled the navy to make the prize. This was done under a promise of payment if their services should prove to be of value. They now petitioned against the proceeds in the registry.

LOWELL, J. The petitioners have rendered very useful services, and the only question is whether they can be paid out of the fund. The prize acts do not meet the case ; but they are not exhaustive of the subject of prize. In the *Dos Hermanos*, 10 Wheat. 306, cited at the bar, non-commissioned captors were allowed one-half the value by way of salvage. The whole has sometimes been given : *The Haase*, 1 Rob. 286. So in case of recapture by the crew of the prize, or by the army, or by non-commissioned persons,

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salvage is awarded: *The Hope*, Hay & Marriott, 216; *The Helen*, 3 Rob. 224; *The Progress*, Edwards, 214.

That the petitioners ought to be rewarded cannot be denied, and that the government as well as the captors would be under a strong moral obligation to remunerate them is clear. In the case of the steamer Planter, which was run out of Charleston, with great skill and at great hazard, by the negro Robert Small and his associates, and delivered to our fleet, congress granted them one-half the value; 12 Stats. 904. As that vessel does not appear ever to have been taken before a prize court, the action of the legislature became necessary. But, in this case, the simple and practical mode of arriving at the compensation, and the mode by which the burden will be properly distributed in exact proportion to the benefit conferred is, to make it a charge on the fund. And it comes fairly within the analogy of the cases cited, which hold those to be salvors who are not technically captors, but who have made or contributed to the capture.

The amount of salvage suggested was five per cent of the net value of the prize. I have concluded to award two thousand dollars to each petitioner, which is about four per cent in all, and a reasonable counsel fee.

H. Flanders, of Philadelphia, for the petitioners.

R. H. Dana, Jr., district attorney, for the naval captors and the government, submitted the case without argument.

THE GEORGIA.

SEPTEMBER, 1866.

A sale by a belligerent of a war ship to a neutral in a neutral port is invalid by the law of nations as understood both in England and America.

This doctrine applied to the sale of the Georgia in the port of Liverpool in June, 1863, the purchaser having full notice of the character of the vessel, but buying in good faith and for his own use.

PRIZE. — The Georgia was captured as prize on the high seas by the Niagara, and sent into a port of this district for adjudication. The taking of depositions in Liverpool, and elsewhere, occupied a considerable time. The facts appear in the opinion of the court.

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R. H. Dana, Jr., district attorney, for the United States and captors, cited, *The Minerva*, 6 Rob. 396; 2 Wildman Intern. Law, 90; *The Etta*, 4 Am. Law Reg. (N. S.) 38; 3 Phillimore Intern. Law, § 486; and, to show the knowledge of the claimant and the notice to the government of Great Britain, Diplomatic Corresp. of the United States, 1863 and 1864, and the claimant's deposition.

He contended further that the Georgia was dismantled and sold for the express purpose of avoiding imminent capture.

J. A. Loring, for the claimant. The whole doctrine asserted by the captors rests on *The Minerva*, and that was decided on its own circumstances, the learned judge being of opinion that the *bona fides* of the sale was not clearly made out.

LOWELL, J. The depositions establish that this is the same vessel that was the subject of diplomatic correspondence between Mr. Adams and Lord Russell in 1863 and 1864, before the sale to the claimant; that she was built on the Clyde, and manned, equipped, and armed, on the coast of France, by men, guns, and arms, taken from Liverpool; that she sailed on a cruise in which she captured and destroyed several American ships, put into a port of France for repairs, and sailed thence to Liverpool, where she arrived May 1, 1864. Her history was well known and was made the subject of a debate in parliament on the twelfth of May. On the second of June the claimant agreed to buy the vessel, but delayed to take title, having some doubt whether a British register would be granted her; but being reassured upon this point by the collector of customs at Liverpool, the sale was completed on the thirteenth of June. On the seventh of June Mr. Adams wrote to Lord Russell, "I must pray your lordship's pardon, if I take the liberty to renew, in this case, the observations which I had the honor to submit in my note of the 14th of March of last year, on the case of the steamer Sumter *alias* the Gibraltar. On behalf of my government I feel it my duty, in consonance with the practice heretofore adopted by Great Britain, to decline to recognize the validity of the sale of this armed vessel, heretofore carrying on war against the people of the United States, in a neutral port, and to claim the right of seizing it wherever it may be found, on the high seas." Dip. Corresp., 1864, part 2, p. 100. The note referred

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to, is one in which Mr. Adams had cited from Mr. Phillimore's¹ then recent work on International Law, the statement that the purchase by neutrals of enemies' ships of war was held by British courts to be invalid. Dip. Corresp., 1863, part 1, p. 152. In accordance with this notice, given six days before the claimant's title was completed, Mr. Adams sent word to the commander of the Niagara to seize the Georgia, if he could find her on the high seas. This, too, was well known before the ship sailed, as appears by the letters and telegrams in this record. She was seized and sent in accordingly.

I ought at the outset to say that I am entirely satisfied that the sale was genuine and for value, and that any suspicions which were raised by the apparent connection of certain persons with the Georgia, as well after as before the sale, are fully explained; so that the only question of any importance in the case is whether the point of law was well taken by Mr. Adams. Only one case earlier than our war has been found; and the text writers have contented themselves with citing it; *The Minerva*, 6 Rob. 396, is agreed by them all to have settled the law for Great Britain, that such a sale is invalid. 3 Phillim. Intern. Law, 607; 2 Wildman, 90; Twiss, Law of Nations (in time of war), 465. In France the law is said to be that not even merchant ships can be lawfully sold by a belligerent to a neutral after the war has begun: 2 De Pistoye & Duverdy, p. 1, tit. 6, ch. 2; Lawrence's Wheaton, 581, n. 182; Heffter (French ed.), § 166. This stringent doctrine is defended by some writers and attacked by others on grounds of justice and policy, but all agree that it is the law now administered in France. Mr. Lawrence, in the note above cited, says the law of Russia is like that of France. In England merchant ships are put on the same footing as other merchandise, but the sale must be above suspicion. Phillim. *ubi sup.*

Mr. Phillimore in this part of his treatise adopts the Essay of Judge Story, printed as an Appendix to the second volume of Wheaton's reports, so that we have the authority of both these learned jurists for the doctrine that a sale of a ship of war is illegal. When we find that the law of several continental nations

¹ Now Sir R. Phillimore, judge of the high court of admiralty.

The Georgia.

prohibits the sale of all ships, and the law of England, approved by Mr. Justice Story, and by the English and American writers who mention the subject at all, excepts only merchant ships, we may well conclude that this sale was illegal.

But we need not rest here. In August, 1864, Lord Russell notified Mr. Adams that the government had given directions that in future no ship of war, of either belligerent, should be allowed to be brought into any of her majesty's ports for the purpose of being dismantled and sold. Dip. Corresp., pt. 2, p. 278. This order is carefully worded, as if it were a mere regulation of the right to enter the port for a particular purpose; but it in fact assumes the right to prevent a sale of war-ships when in port; a power which the government would never have usurped if the sale were considered lawful. It is an admission of its illegality. In October, 1864, *The Etta*, which had been a confederate cruiser, and had been sold to British merchants in Nassau, and afterwards captured, was condemned by Judge Field, who delivered an able and learned judgment, founded on the case of *The Minerva* and the other opinions which I have cited. *The Etta*, 4 Am. Law Reg. (N. S.) 38. In the argument of the case before me, it was said that the British government had not only acquiesced in this judgment, but had affirmed its justice and propriety in a dispatch from Lord Russell to Lord Lyons or one of her majesty's representatives here. I have not been able to verify the accuracy of this statement, but it was admitted by counsel to be true, and is highly probable, as the doctrine had already been conceded by the dispatch of August, 1864. Considering the part which negotiation necessarily plays in international law, and the great experience and well-known character of the statesmen who expressed this opinion we cannot but attribute to it at least the weight that the civil law gives to the *responsa prudentum*.

Such being the uniform voice of all the authorities, without a single dissent, it is hardly necessary to examine the reasons on which the doctrine rests. The duty of a neutral is to give no aid to either belligerent. This duty is evaded if ships of war in great danger of capture, as was notoriously the case here, can be turned into money in the neutral port in which they have taken refuge. The standing order which the British government had adopted,

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limiting the time that such vessels should stay in the ports of the empire, was in fact evaded by the sale of the Georgia, against the protest of our representative, and the very dangers which Lord Stowell apprehended are illustrated by this case.

While, therefore, I cannot but regret that an innocent purchaser should suffer, I must hold the claimant's title to be bad. If Mr. Bates had taken the advice of a lawyer, or of the foreign office, instead of relying on the opinion of the collector of customs of Liverpool, whose communications with the foreign office appear to have been liable to some interruptions during the war, he would have learned that the law of nations, as accepted both in England and the United States, was against the validity of such a transaction, and that the government of his country had been twice distinctly notified of our opinion in the matter. The claimant appears to have relied on some warranty from his own government which the issuing of British papers might imply. If so I have no reason to suppose that his reliance is vain. If an official person has made a mistake, no doubt the sufferer will be indemnified by any right-minded government; and that of Great Britain has not been backward in meeting such obligations.

Decree of condemnation.

Affirmed on appeal, 7 Wallace, 32.

In re McDONALD.

JULY, 1866.

The power given to the secretary of war to discharge minors unlawfully enlisted in the army, does not take away the jurisdiction of the federal courts to inquire on *habeas corpus* into the validity of the contract, and to discharge a minor who is improperly held in the service.

Whether congress could constitutionally vest exclusive jurisdiction in the secretary, *quære?*

Whether the oath of enlistment is conclusive evidence of age as against the parent petitioning for *habeas corpus*, or is only intended for the protection of the mustering officer, *quære?*

Where the statement of age on the enlistment paper was not sworn to, *held*, it was not an oath of enlistment within the statute of 1862.

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Whether a minor under sixteen years old can be lawfully enlisted, even with the consent of his father ; and whether one between eighteen and twenty-one years old can be lawfully enlisted without such consent, *quære ?*

Where the minor was less than eighteen at the time of his enlistment, and at the date of the writ, and his father had not consented, and no oath of enlistment was taken, he was ordered to be discharged on his father's returning the advance which the recruit had received.

Habeas corpus to Colonel Wildrick, commanding officer of Fort Independence, in Boston harbor, to test the validity of the enlistment of James McDonald, in the army of the United States. By the return to the writ and the other evidence, it appeared that the boy was enlisted in May, 1866, being then seventeen years and six months old, without the consent of the petitioner, his father. Upon the back of the enlistment paper was a declaration, signed by the boy, declaring his age to be eighteen ; there was no *jurat*, nor was any evidence given that this declaration had been sworn to. The petition was filed about two months and a half after the enlistment, and was the only act or declaration of the petitioner expressing his dissent.

G. W. Searle, for the petitioner.

W. A. Field, assistant district attorney, for the respondent.

1. Congress has a constitutional power to enlist minors without the consent of their parents: *U. S. v. Bainbridge*, 1 Mason, 71 ; *Commonwealth v. Gamble*, 11 S. & R. 93 ; *Lanahan v. Birge*, 30 Conn. 477. 2. The several statutes, construed together, authorize the enlistment of young men eighteen years old or more, without the consent of their parents, and between sixteen and eighteen with consent. [Counsel here cited the acts.] 3. The oath of enlistment conclusively proves that this soldier was eighteen years old. See Stat. 13 Feb. 1862, § 2, 12 Stats. 339. If not, the father's consent may be inferred from his knowledge and inaction. 4. The only remedy for one who is under the lawful age is by applying to the secretary of war : Stat. 24 Feb. 1864, § 20, 13 Stats. 10 ; Stat. 4 July, 1864, § 5, 13 Stats. 380 ; *Ableman v. Booth*, 21 How. 523 ; *In re Jordan*, 11 Am. Law Reg. Vol. 2 (N. S.) 749 ; *In re Spangler*, ib. 598.

LOWELL, J. A careful examination of the acts of congress regulating enlistments in the army is requisite to the determination of this case ; and the more so, because comparatively few decisions

are to be found in the books, each case being usually heard in a summary way, before a single judge, whose action is final. The act of 16 March, 1802, § 11, 2 Stats. 135, which is the foundation of the whole system, authorizes the enlistment of able-bodied citizens, between the ages of eighteen and thirty-five years; and provides that no one under the age of twenty-one years shall be enlisted or held in the service without the consent of his parent, guardian, or master. During the war of 1812, congress found it necessary to recruit men between eighteen and fifty years old, and to dispense with the consent of parents: Stat. 10 Dec. 1814, 3 Stats. 146. They took pains to guard against hasty or ill-advised enlistments of minors; for, by § 2, such recruits were to be at liberty to reconsider and withdraw their enlistments at any time within four days after they were made.

On the third of March, 1815, 3 Stats. 224, after the conclusion of peace had become known to congress, an act fixing the military peace establishment of the United States was passed, which repealed that of 1814, for it enacted (§ 7), that the several corps should be recruited in the same manner, and with the same limitations, &c., as were authorized by the act of 1802, and one of those limitations was, that only persons between eighteen and thirty-five years old should be enlisted; and another was, that no minor should be either enlisted or held without the consent of his parent. In 1838 a law was passed which repealed so much of the act of 1802 as established a standard of height for enlisted men: Stat. 5 July, 1838, § 30, 5 Stats. 260. The next statute is that of 28 September, 1850, § 5, 9 Stats. 507, which makes it the duty of the secretary of war to order the discharge of any soldier who was under twenty-one years at the time of his enlistment, upon evidence that such enlistment was without the consent of his parent or guardian.

Before examining the several acts passed during and since the rebellion, we may properly review the state of the law up to 1862. It seems clear that the legislation of 1815 adopted or re-enacted the law of 1802, and that congress so understood the case in 1838 and 1850. And yet most respectable authority may be cited to the point, that the consent of parents was unnecessary: 5 Opinions Att'y-Gen. 313; 6 ib. 607; *Phelan's Case*, 9 Abbott, Pr. R. 286.

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These opinions, notwithstanding their origin, are of little weight, because the learned attorneys and judges who pronounced them overlooked entirely the act of 1815. They did not construe that statute as not repealing the one of the former year, but merely failed to cite it, and assumed that there was no legislation after December, 1814.

Against this may be put the plain language of the statute of 1815, the practice of the war department, and a great many decisions of the courts, among which are the following: *In the Matter of Dobbs*, 21 How. Pr. R. 68; *U. S. v. Wright*, 5 Phila. R. 296; *In the Matter of Keeler*, Hemp. 306; 10 Opinions Att'ys-Gen. 146; *In the Matter of Kimball*, 9 Law Rep. 500; *Bamfield v. Abbot*, ib. 510. Shaw, C. J., in *Kimball's Case*, p. 502, after showing that the presumption was that congress would not undertake to enlist minors without the consent of their parents, says: "In December, 1814, during the darkest period of the last war with England, it being necessary to fill the ranks of the army, an act was passed repealing a previous statute which required the consent of parents and guardians; and providing, with great care, that minors might be enlisted without such consent. This law was repealed in March, 1815, having been in force only about four months." See, besides, Opinion of Jackson, J., 1 Carolina Law Repository, 47; *Commonwealth v. Downs*, 24 Pick. 227; *Re Higgins*, 16 Wis. 351; *State v. Dimick*, 12 N. H. 194; *State v. Brearly*, 2 South. (N. J.) 555; *In the Matter of Dew*, 25 Law Reporter, 538.

It is plain, then, that up to 1862 no minor, whose father was living, could be enlisted in the army without the father's consent. The act, 13 February, 1862, § 2, 12 Stats. 339, is in these words: "That the fifth section of the act of twenty-eight September, eighteen hundred and fifty, providing for the discharge from service of minors enlisted without the consent of their parents or guardians be, and the same hereby is, repealed: *provided*, that no person under the age of eighteen shall be mustered into the United States service, and the oath of enlistment taken by the recruit shall be conclusive as to his age." It would seem probable that congress overlooked the act of 1802, which forbade the enlisting or holding of minors without consent, for they do not repeal it in terms. And the act of 1862 is so explicit in repealing merely the fifth

section of the law of 1850 that it seems very difficult to construe it as an implied repeal of the principal act regulating enlistments. And this was the view of the war department; for by the Army Regulations of 1863, Appendix B, § 16, p. 511, officers are instructed that the act of 1862 prohibits the discharge of minors, but does not authorize their enlistment without the consent of their parents, masters, or guardians. I have seen no later regulations, but it is said that the practice has since been changed, and that minors are now enlisted between the ages of sixteen and eighteen years with the consent of their parents, and above eighteen without consent. This practice is said to be founded on the three latest statutes: Stats. 24 Feb. 1864, § 20, 13 Stats. 10; 4 July, 1864, § 5, 13 Stats. 380; and 3 March, 1865, §§ 17, &c., 13 Stats. 489, 490. The first of these authorizes, and the second requires the secretary of war to discharge all persons who at the time of the application are under the age of eighteen years, upon due proof that they are in the service, without the assent, express or implied, of their parents or guardians; and the third punishes with great severity officers who shall enlist or muster persons under sixteen years old in any case, or those between sixteen and eighteen, without the consent of their parents.

This review of the statutes shows us these inconsistencies: the law of 1802 authorizes enlistments of persons between eighteen and thirty-five, with consent, &c., if under twenty-one. This law has not been expressly repealed. The act of 1862 prohibits the mustering in of any one under eighteen, but gives no remedy for a breach, and makes the oath of enlistment conclusive; the laws of 1864 require the secretary to discharge all persons under eighteen who have been enlisted without consent, notwithstanding the oath; the law of 1865 punishes the enlistment of a minor between sixteen and eighteen unless with consent. So that while there is not upon the statute book any law authorizing the enlistment of persons under eighteen in any case, nor between eighteen and twenty-one without consent, yet the laws of 1864 and 1865 *imply* that between sixteen and eighteen they may be enlisted with consent, and above eighteen without it, because it is only when the consent is wanting that the secretary is to discharge or the officer to be punished in the first case, and there is no discharge or pun-

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ishment in the second. I must say that it appears to me a very doubtful question whether a lawful enlistment can be made of any one under eighteen years old, or of any minor without the consent of his father, and I do not undertake to pass upon these questions at this time. I need not decide them, because this recruit was less than eighteen years old, and was enlisted without his father's consent. I say he was less than eighteen years old, because assuming that the oath of enlistment would be conclusive upon the courts, when applied to by the father, which I very much doubt, as well as a conclusive protection to the mustering officer, yet in this case no oath was taken, and therefore the statute cannot apply. See *United States v. Wright*, 5 Phila. R. 496. The enlistment, therefore, was illegal upon any construction of the statutes.

It is argued for the respondent that the courts have no jurisdiction of this question, because congress has established a sufficient tribunal in the secretary of war, who must be presumed to have exclusive authority. I can see no good reason to suppose that this was the intention of congress. It has always been the right and duty of the war department to discharge persons illegally enlisted. In one of the earliest reported cases of this sort, the point was taken that the application should have been made in that quarter; but the learned judge of the western district of Tennessee said that congress not only had not undertaken to interfere with the privilege of the writ of *habeas corpus*, but

- that they could not lawfully do so excepting under the circumstances pointed out by the constitution: *United States v. Anderson*, Cooke (Tenn.), 143; and a like remark was made in *Keeler's Case*, Hemp. 306; and there seems to be force in the suggestion. The act of 1850 expressly imposed this duty on the secretary, and all the adjudged cases which arose between that time and the date of the president's proclamation, suspending the privilege of the writ during the war of the rebellion, are authorities against the respondent's contention. If a statute creates a new right and provides a remedy, the procedure pointed out by the statute must be followed; but the rule is otherwise where a new remedy is given for an old right, unless the intent that it should be exclusive is clear. So far is that from being the case here, that the acts, as I have said, are merely declaratory of what the secretary

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might and ought to do by virtue of his office, unless expressly prohibited by congress. While the privilege of the writ was suspended, as it was when these acts were passed, this was the only remedy, and it still is often the most convenient; but it would be contrary to all precedent to oust the jurisdiction of the courts, in a matter involving the liberty of the citizen, by a mere implication, from the fact that the legislature has given the appropriate executive departments power to act in the premises, and this during a war when there was, for the time, no other remedy. In most of the dealings of the citizen with the government, it is the province of some department to see that justice is done him; but if it should be denied, or if any dispute arises, the courts must finally determine the matter. Here the relator had his choice of remedies. He might have applied to the secretary, who would have had the power and the will to do him justice; but if he finds it more convenient, he has a right to his writ.

I may here confess to a serious doubt whether, upon the true theory and practice of our mixed government, the State courts ought ever to have taken jurisdiction of these cases. Upon this point, *Ableman v. Booth*, 21 How. 506, and other authorities, cited in argument, are instructive. But the practice is now so well established that only the supreme court of the United States can change it.

I must discharge the prisoner; but, following the rule which the statute of 1864 lays down for the secretary of war, and treating the remedies as truly concurrent, I shall order that the father do first return to the United States the clothing supplied by them to the son, which, as I am informed, is all that has been advanced in this instance.

Order accordingly.

UNITED STATES v. WILLIAM C. PARSONS & AL.

SEPTEMBER, 1866.

A shipmaster, who is sued on his bond for the safe return of his crew, may give parol evidence of the contents of a consul's certificate, authorizing the discharge of one of the men, on satisfactory proof that such a paper was once in existence and has been lost.

Notwithstanding the very sweeping language of § 8 of Stat. 28 Feb., 1803, and § 8 of Stat. 20 July, 1840, requiring masters of American vessels to give bond for the return of all the crew, unless discharged in a foreign country with consent of a consul, &c., yet these sections, construed with the aid of the other parts of those statutes, cannot be held to require a master to return to the United States foreign seamen shipped at their own home, for a particular cruise, ending where it began, and discharged there, according to the terms of their contract, though without the consent of a consul.

The consent of a consul could not be rightly withheld in such a case, and there is no law requiring it to be asked.

Whether the bond is intended to be given for seamen, even if shipped in the United States, who by the terms of their engagement are entitled to be discharged abroad, *quære*?

DEBT on a bond given by the master of the ship William & Henry, as required by the act of 28 February, 1803, § 1, 2 Stats. 203, for the return to the United States of the company of the ship. The ship sailed from New Bedford, in 1860, on a whaling voyage to and in the Pacific Ocean, in the course of which the defendant, Parsons, was deprived of his command by the owners, and came home, and the vessel was brought back by another master, who failed to produce to the boarding-officer five of the original crew, and five persons, not shown to be citizens of the United States and not shipping as such, who had shipped at Tombas, in Peru, for a whaling cruise which by its terms ended at Tombas, where they were discharged in accordance with their contract. As to none of these persons was there any consular certificate. By consent of parties the case was submitted to the court, without a jury.

There was evidence that of the crew shipped at New Bedford, three had deserted, one had died, and one had been discharged by Captain Parsons, with the consent of the consul, to whom the three months' extra wages had been paid, and a fee for his certificate.

W. A. Field, assistant district attorney, for the plaintiffs.

E. L. Barney, for the defendants.

LOWELL, J. This master had no opportunity to comply with the literal tenor of his bond by exhibiting his crew to the boarding-officer, nor his consular certificates or satisfactory evidence of the death and desertion of certain of the men to the collector of New Bedford, because he was not permitted to bring the ship home, but came before the ship arrived, and without any of her papers. I cannot say that he is exonerated from his obligation under the bond by his discharge abroad, so far as his own acts or neglects are concerned; but he may now produce the evidence, which, if he had remained on board the ship, he should have given to the revenue officers. So far as four of the men shipped at home are concerned, the evidence is satisfactory that one died and three deserted. For the fifth he should have a consular certificate, and it has been held, that no other evidence of the consul's consent is admissible: *United States v. Hatch*, 1 Paine, 336. But the case here is, that such a certificate was paid for and promised, and, I may well presume, it was given. No case has decided that the contents of a lost certificate cannot be proved by parol; it is the consul's consent which cannot be so proved; and as Captain Parsons has not had the custody of the papers, and his successor may not have had his attention called to this man's discharge, it is not improbable that the papers may have been mislaid in the consul's office or on board ship.

The persons who were shipped for an intermediate off-shore cruise, and were discharged when their time was out, seem to be within the letter of the statutes of 1803, § 1, 2 Stats. 203, and of 1840, § 8, 5 Stats. 395; which require a bond to be given for the return of all the crew, including those shipped in a foreign port. And yet, it can hardly have been the intent of congress that foreigners, shipped in their own country, for a distinct voyage or part of a voyage, ending where it began, should be brought to the United States, unless some consul should consent to their discharge. Certainly, no consul would have any right to dissent in a case of that kind, and I know of no possible advantage which would accrue to such seamen by being discharged before a consul. Undoubtedly, such men are American seamen, within the protection of our laws, and can call on the consul to redress their grievances:

Matthews v. Offley, 3 Sumner, 115; but supposing them to have no cause of complaint, I do not know that they are deemed incapable of settling their own affairs with the master. The act of 1840, § 9, 5 Stats. 395, authorizes a consul to discharge any mariner who shall complain to him that the voyage is continued contrary to his agreement, or that he has fulfilled his contract; and if upon the face of the articles the consul finds the complaint to be well founded, he shall then require an advance of three months' pay, as provided by the act of 1803, unless he shall be satisfied that the contract has expired or the voyage been protracted by circumstances beyond the control of the master, and without any design on his part to violate the articles of shipment, in which case he may discharge the mariner without requiring the three months' additional pay. This statute seems to imply that, where the contract has expired, it is the first duty of the master to discharge the man, and that it is only when he fails to do so that the consul is to be applied to, and then the fact that the man has not already been discharged is *prima facie* evidence against the master on the question of additional pay.

It has never been decided that the bond must be given for seamen who, by the very terms of their contract, are to be discharged abroad. Such agreements may be rare, and may have been overlooked. The act of 14 April, 1792, § 8, 1 Stats. 256, required the master of an American ship, which was sold in a foreign port, to send his crew back to the State where they entered on board, "unless the crew are liable by their contract, or do consent to be discharged" at the foreign port. The act of 1803, § 3, provides for paying the consul three months' extra pay, for each man, when a ship shall be sold in a foreign country, and her company discharged, or when a seaman or mariner, a citizen of the United States, shall, with his own consent, be discharged in a foreign country. This act is silent concerning seamen who by their contract are liable to be discharged in a foreign country, though they are mentioned in the act of 1840, already cited. The words of the bond and of the statute establishing it, are more extensive, requiring the master to bring home all seamen who have not died, &c., or been discharged with the consent of a consul. Taking the whole law together, it seems reasonable to understand

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it as meaning that all those shall be brought home, who by their contract are entitled to be brought home, unless, &c. I cannot readily believe that the intent of the law is, that men who have freely, and for reasons satisfactory to themselves, agreed on a month's voyage, to end abroad, are to be paid three months' wages, and that the United States is to be paid for still another month, unless the consul shall remit it. And until 1840 the consul had no power to remit. It may be argued, that the policy of the legislature is to discourage the discharge of our seamen in foreign countries, and to guard the United States against the expenses of their support.

However this may be with citizens, or those who appear as such on the crew list, foreigners shipping abroad as such, and domiciled there, are never entitled to the extra pay, and the United States are not liable for their support; and there is no reason, as I have said, why the consul should be formally applied to to ratify their necessary discharge, unless they choose to invoke his power on account of some failure by the master to carry out the contract. Notwithstanding the very sweeping language of the statutes concerning the bond, I hold that it does not require the master to return to this country foreigners who ship in their own home for an intermediate cruise, which ends where it began; or if it does, that the condition is satisfied by their discharge at their home, in compliance with the very terms of their engagement, though without the consent of a consul. Such being the case here, there must be,

Judgment for the defendants.

CIRCUIT COURT.

EDWARD F. SIZE & AL v. PAUL CURTIS.

MAY TERM, 1866. Before CLIFFORD and LOWELL, JJ.

While the internal revenue law of 1863, which laid a duty of two per cent upon ships, was in force, a ship-builder contracted to sell a vessel which he was then building for a certain sum "which shall be in full." Not long before the ship was completed, the statute of 1864 was passed which laid a duty of two per cent upon the hulls of ships, the effect of which was that the builder paid upon the hull only, instead of upon the whole ship. *Held*, that he could not recover of the purchaser

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the amount of the tax, as provided by § 94 of the new act, for duties imposed by that act and not provided for in the contract, because the tax was merely changed and reduced, and not imposed by the new statute.

ASSUMPSIT. — From the agreed facts it appeared that the defendant, a ship-builder, contracted for the sale of an unfinished vessel to the plaintiffs, and the parties exchanged notes of the contract, which were substantial counterparts of each other, and of which one part was as follows : —

EAST BOSTON, May 9, 1864.

For value received, I, Paul Curtis, agree with Edward F. Size, John Chase, and John S. Pray, to sell them the ship I now have on the stocks, nearly completed, for eighty-one thousand five hundred dollars, equal to cash, when the ship is completed, which shall be in full, to have a tank and bilge pumps, and to be fitted as I usually fit my ships, that is, one suit of every thing complete.

The ship was completed and delivered early in July, 1864, and presently afterwards the assessor of the district, in accordance with information given him by the defendant, assessed upon her as the property of the plaintiffs an excise tax in behalf of the United States. The plaintiffs insisted that the tax should have been assessed to and paid by the defendant ; but the officers of the revenue refusing to go into this question, they paid the amount, and brought this suit to recover it of the defendant. And it was agreed between the parties, that if the tax should properly have been assessed to and paid by the defendant, and if he would in that event have had no recourse over upon the plaintiffs therefor, judgment was to be rendered for the plaintiffs for the amount so paid by them, with interest ; otherwise, they were to be nonsuited.

D. Thaxter & S. Bartlett, for the plaintiffs.

E. Wright, for the defendant.

LOWELL, J. By the ninety-fourth section of the act of June 30, 1864, 13 Stats. 267, by virtue of which, as both parties agree, and as is obvious, this tax was assessed, the manufacturer or producer of the various articles therein mentioned is to pay a duty upon them. Among other articles are the hulls of ships, on which are to be paid two per cent *ad valorem*. The assessment, therefore, should have been made to the defendant, who was the manufacturer of the hull of this ship, and the tax should have been paid by him. But he alleges that he would have been entitled to re-

cover the amount of the plaintiffs under the 97th section of the same act, 13 Stats. 273, which, so far as material to this case, is as follows: "That every person, firm, or corporation, who shall have made any contract prior to the passage of this act, and without any provision therein for the payment of duties imposed by law enacted subsequent thereto, upon articles to be delivered under such contract, is hereby authorized and empowered to add to the price thereof so much money as will be equivalent to the duty so subsequently imposed on said articles and not previously paid by the vendees, and shall be entitled by virtue hereof, to be paid, and to sue for and recover the same accordingly."

By the act of March 3, 1863, which was in force when the contract was made, the defendant would have been assessed two per cent upon the value of the finished ship, and it is not disputed that as between these parties the defendant must have paid this tax, because the payment for the ship was to be "in full." The actual assessment was of a like percentage upon the hull only, and though the new law may lay other taxes on the materials used for rigging, &c., which would make the actual indirect burden upon vessels as great as before, concerning which we have not made inquiry, it is obvious that in this case of a ship nearly completed in May, and delivered within a few days after the act of June 30 was passed, the defendant must have escaped any such assessment, and in point of fact have been liable to an assessment of about seven hundred dollars on this ship, instead of about sixteen hundred dollars, which by his contract he appears to have expected to assume and pay.

It cannot be doubted that the intent of the 97th section of the new law is to throw upon the purchaser the burden of an unexpected tax, which by increasing the cost, is presumed to have increased to the same extent the value of the article. But here the defendant asks the plaintiffs to pay him seven hundred dollars more for what has cost him nine hundred dollars less than the parties must be supposed to have anticipated. His argument is that this tax was imposed by the new act, and that the parties in their contract made no provision for the contingency of a new law being enacted.

We have examined this point with much care, because it must

be of importance in a large class of contracts, and we are of opinion that the statute expresses what all must admit to have been the purpose of its framers. To enable the manufacturer to recover, it is not enough to show that the tax is assessed under the new law, which of course it must be, since the former law is repealed, but that the article to be delivered has had a duty imposed upon it by the new law to which it was not subject under the old. When this contract was made a tax existed by law upon ships, and this was in contemplation of the parties, and the defendant was to pay it. The new law provides for a tax on ships, but at the same moment, by repealing the former statute, abolishes a still larger duty. The defendant is to have from the plaintiffs a sum equivalent to the new imposition. Can this sum be ascertained except by looking at the net result to him of this enactment? Take the case of a simple re-enactment of the duty. The parties have made a contract, and the manufacturer is to pay the tax. It is assessed to him at the same time, and for the same amount as was expected, and he pays it and calls on his vendee to refund. The answer would be this tax is retained, not imposed by the statute. And so *a fortiori* of a tax reduced. The imposition to which the law refers is a new one, and not one merely retained or diminished. It must be not only a duty imposed on the particular ship by the assessor, under and by virtue of the new law, but a duty imposed on the general article of ships, by the new law, as contradistinguished from the old. In this sense, the only just one between contracting parties, and a perfectly fair and reasonable one in itself, the tax on ships, was not imposed by the new law.

If it be said that the act of 1864 imposed a duty for the first time upon the hulls of ships, it is enough to reply that the tax upon the completed vessel included the hull; and if a distinction is to be taken between the ship and the hull, then this tax upon the hull was not a tax upon the article contracted to be delivered, which was a ship.

Judgment must be entered for the plaintiffs for \$736, and interest from July 21, 1864, and costs.

DISTRICT COURT.

THE E. H. FITTLER.

SEPTEMBER, 1866.

It seems, that the consignee of goods under a bill of lading, if he is the only person having cargo on board the ship, or all the consignees, if unanimous, have the right to direct the master to unlade at any usual and convenient wharf at the port of discharge.

In the case of a general ship having the goods of several shippers, the master may lawfully proceed to any such wharf without consulting the shippers.

It seems, that, by the usage of the port of Boston, a majority of the shippers, that is, those who pay the greater portion of the freight, may choose the wharf.

If so, the choice must be notified to the master before he has himself come under liabilities to the wharfinger of a wharf chosen by himself.

LIBEL in admiralty for damages alleged to have been occasioned by a refusal of the master of the brig to land the libellant's goods at East Boston. The libellant's agents at New Orleans shipped cotton to him at Boston, under the ordinary bill of lading. The brig arrived in the harbor on a Saturday night, and on Sunday her agents at this port sent an order to the master to haul to Union wharf, which he did early on Monday. Soon after he had made fast, and discharged his tug-boat, he received an order from the libellant to haul to Grand Junction wharf, at East Boston, which he refused to do. Some negotiation was had on that day and the next, between the libellant and the agents of the vessel; but the cotton was eventually landed at Union wharf, and was received by the consignee without any waiver of his rights, and he now sues to recover as damages the expense of trucking his goods, which was equal to about one-third the amount of his freight. The libellant owned the greater part in bulk and value of the whole cargo, and was to pay the major part of the whole freight; but there were several other consignments of cotton, tobacco, and hides to several different persons.

LOWELL, J. This case has been very carefully presented in evidence and argument. The question is, What are the respective rights and duties of the carrier and the consignees as to the wharf at which goods shall be landed by a general ship? The *dicta* of Mr. Justice Buller, and the other judges, in *Hyde v. Trent and*

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Mersey Navigation Company, 5 T. R. 389, 397, are cited in all succeeding books as the foundation of the law upon this subject. "A ship, trading from one port to another, has not the means of carrying the goods on land; and, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier." When the case came up for adjudication in England, however, it was decided in the common pleas, the exchequer chamber, and the house of lords, that the carrier is bound to deliver to the consignee; and, if he intends to rely on a substituted delivery, he must plead that his delivery was according to the practice and custom usually observed in the port or place of delivery. *Gatliffe v. Bourne*, 4 Bing. N. C. 314, 3 M. & G. 643, 7 M. & G. 850. And so is the weight of modern authority; Abbott on Shipping (8 Eng. ed.), 378; *Humphreys v. Reed*, 6 Whart. 435; *Ostrander v. Brown*, 15 Johns. 39; *Hemphill v. Chenie*, 6 Watts & S. 62; *Wardell v. Mourillian*, 2 Esp. R. 693; Angell on Carriers, § 298 *et seq.*

It has been recognized as the usage of this and other ports, for the master of a general ship to go to a suitable wharf, and notify the consignees, who then take their goods from the wharf; *The Tangier*, 21 Law Rep. 8; *Cope v. Cordova*, 1 Rawle, 203. So that the general rule is now settled, and it would not require evidence in each case, that such a delivery is sufficient.

But the precise point in this case, namely, what is the usual wharf, and who is to point it out, was not directly involved in these decisions or any others, that I have seen.

The libellant offers evidence that, by the usage of this port, the consignees have the right to order the master to go to any commodious or suitable wharf, and his witnesses concede that, excepting in some particular trades not now involved, if no such order is given, he may choose for himself. This concession avoids the effect of a considerable part of the claimant's evidence, which showed, as do some of the decisions incidentally, that the master of a general ship, with an assorted cargo for several consignees, does not usually, and cannot conveniently, stop to collect the votes of his consignees before proceeding to haul in.

It appeared in evidence that there are many cases, as where the cargo is heavy or perishable, in which it is of the greatest conse-

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quence to the consignees whether their goods are landed at one place or another; and, that, generally speaking, it is a matter of no proper concern to the master. It appears that masters are in the habit of going to the wharf at which the best terms are offered them in "return wharfage," as it is called; but as the cargo pays the wharfage, any commission or percentage on its amount ought to belong to the owners of the cargo; and no court could consider this a valid reason for giving the choice of place to the master. A single consignee of a heavy cargo coming coastwise may find his cartage equal in amount to his whole freight. Take a cargo of iron rails, ordered by a railway company that has its wharf and track at the north end of the town, is it reasonable that the master should, for the sake of a petty percentage on what the company itself pays, land the cargo at South Boston, where ships may be scarce, and return wharfage high, against the known wish of the owners of the goods?

This statement of the interests of the parties of itself exhibits their rights, at least where there is but one consignee, or where the consignees are unanimous; for it may be safely laid down as a proposition of law, that, as between two points within the port equally convenient for the carrier, he must deliver at that most convenient for the consignee, if seasonably asked to do so. It would be for the carrier to show a usage to the contrary, and then to establish its reasonableness. In the case of one consignee of the whole cargo, having his place of business at the port, and readily accessible, it might be worthy of serious consideration, if the case were now before me, whether the master must not consult with him at all events.

When there are several consignees, the case is different. The master cannot conveniently consult them, and is not bound to do so. Here the evidence shows the course of trade to be, that the majority, that is, those who together pay more than half the freight, have the right to choose the wharf. This is reasonable, because it is of no special moment to the minority whether the master or the majority choose a suitable wharf; and it is as convenient and just a mode of ascertaining the majority as any other. The merchants appear to be unanimous about it, that is, that the power of the majority is as great as that of the whole. Some

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shipmasters, and perhaps one or two merchants, know of no custom at all about the matter, though nearly all the witnesses say that, either by courtesy or by right, the choice in fact usually lies with the consignees of the cargo.

It being shown, however, that, in the case of a general ship, this right is often unimportant, and is waived, and is presumed to be waived unless notice is given ; and this whether one person alone, or several together, constitute the majority, the consignees ought to be careful to give their notice in due season.

This vessel had her agent in Boston, who, in good faith, engaged the berth at Union wharf, and the vessel was hauled in, and made fast, and her tug was discharged. I cannot tell what inconvenience and damage might result to a ship in changing her berth after that period. The libellant should have found the agent or the master earlier. It is not reasonable to expect them to change their arrangements after they have gone so far. What is seasonable notice will depend on the facts of each case. Here it was too late.

It is to be understood that the usage was not alleged to apply where any peculiar and important convenience to the ship would be promoted by her going to a particular wharf. No point of that sort was in controversy.

Libel dismissed.

J. T. Morse, Jr., for the libellants.

J. A. Loring, for the claimants.

NOTE. — In the case of *Silsbee v. Wales*, decided in this court in 1870, it was admitted by both parties that no such general usage could be proved as affecting the Calcutta trade, and it was held that in the absence of such usage the consignees must be unanimous, or they could not control the choice of a place of discharge.

CIRCUIT COURT.

UNITED STATES v. FANJUL.

1866.

The penalty of a recognizance for the appearance in court of a defendant charged with a crime under the customs act of 1799, is not a penalty recovered by virtue of that act.

It seems, that a fine imposed under that act goes, in part, to the informer.

But money paid into court by the sureties on a recognizance is not such a fine, and is not instead of a fine, though the alleged crime was one that might have required the imposition of a fine if the defendant had been convicted; and no part of it belongs to the informer.

THE defendant was arrested on an indictment charging him with a criminal offence under the Customs Act of 1799, and gave bail for his appearance, but afterwards made default, and his sureties paid the amount of the bond into court. The petitioner alleged himself to be the person who first informed the collector of the crime committed by the defendant, and prayed that a moiety of the money in the registry might be paid out to him.

W. A. Field, assistant district attorney, submitted the case without argument, excepting a citation of *Ex parte Marquand*, and a statement of the practice which has followed that decision.

LOWELL, J. In *Ex parte Marquand*, 2 Gallison, 552, it was decided that fines imposed on a defendant in a criminal case, under the statute of 1799, were to be distributed under § 91 of that act, 1 Stats. 697, like penalties and forfeitures; and it is understood to have been the practice in all the districts, since that case, to admit informers to a share of such fines. But in this case the penalty, so called, which has been paid into court, is not a fine, penalty, or forfeiture recovered by virtue of that act, but the penalty of a recognizance taken by the court to insure the appearance of the defendant to answer the charge. The amount in which the bond was taken was estimated with a view to all the circumstances of the charge, including the possible fine; but it was in no sense a substitute for the fine. If the defendant, after his default, had appeared, or had been brought in by his bail, the court might have remitted to the sureties the whole or some part of the penalty of the recognizance, by virtue of the act of 1839. Supposing the time for such action to be passed, and that the sureties have relinquished all claim to a remission, still if the defendant is found he can be tried, and if convicted may pay a fine, in which the petitioner may be interested; but as I said before, no such fine or penalty has yet been imposed or paid. It was once the law of England, in certain cases, that upon default of the principal, his sureties should take the punishment which he ought to have borne; and this is what the petitioner says we arrive at in a roundabout way by charging the

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bail. It may turn out to be true, in fact, that the government will be content with this payment, and make no effort to find the defendant; but any bargain to that end would be as illegal as it would be impolitic; and even if it were made, the result would not be that a fine had been paid for a breach of the statute of 1799. It is very doubtful whether an informer has any strict legal right to money paid by way of compromise for a breach of the act, even when the remedy is only of a civil nature. Here there is no evidence of any compromise, or of any payment on account of the breach of a revenue law.

Petition dismissed.

DISTRICT COURT.

THE M. B. STETSON.

DECEMBER, 1866.

A vessel driven on one of the islands in Boston harbor in the daytime set her colors union down, and was pulled off and towed to her dock by a tug, whose master had during the same morning, and before the vessel was beached, offered to tow her up for seventy-five dollars. *Held*, a salvage service.

Salvage is the saving of property from extraordinary sea peril, by persons not bound by any existing contract to render the service. A signal of distress is evidence of such peril; and a vessel driven on shore in a gale, is, while the gale continues, in such peril.

The remuneration in salvage cases is reckoned with a view to the benefit conferred as well as to the time, trouble, danger, &c., of the salvors, especially when the danger is still present or imminent.

A bark loaded with sugar was driven on shore in the harbor of Boston in a severe gale and was promptly rescued and brought to a wharf, while the gale was still blowing, by a powerful tug. Value saved, \$33,000; salvage awarded, \$1500.

THE bark M. B. Stetson, on her voyage from Cuba, with a cargo of sugars, made Boston harbor before daylight on the morning of the 30th of October, 1866. The wind was blowing very heavily from the south-east, and in the darkness the vessel came to anchor about five hundred yards to windward of George's Island, a place nearer shore than was entirely prudent, if there had been an opportunity to choose the ground. The master thought himself in no special danger, and in the course of the forenoon refused to

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take the tow-boat *D. A. Mills* to tow him to Boston at the price of seventy-five dollars. The vessel lay in the same position until soon after one o'clock in the afternoon, when the gale changed to the south-west, and increased in violence, and she parted her starboard chain and dragged towards the island until her stern took the ground, when she swung round and lay nearly broadside on the beach; the tide being between two and three hours' flood. Her port chain continued to hold, and had some effect in preventing the bark from getting as fast on shore as she might otherwise have done.

The master immediately set his colors union down, and the same tug saw the signal soon after and promptly came to his assistance, and on the second trial succeeded in throwing a line on board, put on a very high pressure of steam, and after shifting the position of the hawser twice so that the strain would not pull the tug's bows to leeward, dragged the bark off the shore in fifteen or twenty minutes, with some aid from her own crew, who heaved upon the port chain. When the bark floated the master of the tug ordered her chain to be cut, and then towed her to Boston. The whole service occupied less than two hours.

Almost immediately upon the vessel being relieved the gale began to moderate, and before high-water it had become comparatively calm. Upon examination it was found that the vessel had not been strained nor otherwise seriously injured, nor had she started any leak, so that the cargo was in perfect order. Both vessel and cargo were the property of the claimant and were together valued at about thirty-three thousand dollars. The tug was a large and powerful vessel of her class, valued at about \$18,000. The libellants demanded \$5000; the claimant offered \$500.

J. C. Dodge, for the libellants.

R. H. Dana, Jr., for the claimant. The bark was not in much danger; she might probably have been hauled off at high-water by her own crew; the work done and risk run by the tug were not greater than are common in towage services. The master explains his signal by saying that owing to the relative position of the two vessels, the ordinary signal for a tug, which is a color set in the rigging, could not have been seen by the *D. A. Mills*, which was

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the nearest steamer from which he could expect assistance, and so he set the only signal that could be seen and understood, which was the flag put at the peak, union down; but that he did not intend this to be taken as a signal of distress, but to attract attention. The service is one of towage merely, and not of salvage. *The Princess Alice*, 3 W. Rob. 140; *The Albion*, 2 Hagg, 180 n.

LOWELL, J. I cannot doubt that the libellants have performed a salvage service. Salvage is the saving of vessels or other property from peril at sea by persons not bound by any existing contract to render the service. The compensation in the absence of express contract is understood to be contingent upon success, but that is perhaps not absolutely essential to a salvage service when it has been rendered by request, though if that contingency is shown the contract is presumed to be for salvage; the degree of peril is not usually important except as bearing upon the amount of the reward, provided it be something beyond the mere ordinary dangers of the seas. If there is no danger at all, as where a neutral vessel not liable to condemnation by the law of nations, has been retaken from a belligerent who respects and acts upon the law of nations, or where the master of a ship accepts some aid as mere matter of precaution or to accelerate his voyage or the like, no salvage service is rendered. But where the vessel is in actual or apparent danger, or her position or condition is such that she may probably soon be in danger, and the master acts and permits others to act upon that supposition, it would require a strong case of mistake on his part to reduce the service rendered to something less than a salvage service. So that if there were here merely the fact of the signal seen and acted on, it would be very difficult to say that a salvage service was not undertaken by the master's request. I am aware that there are a good many cases in which salvage and towage have been discussed, and which have turned or seemed to turn upon a distinction between those two kinds of service, but the real inquiry in those cases was, not whether the *service*, but whether the *contract* was for towage or salvage. If a tug plying in her usual waters takes hold of a vessel and tows her into port, under no express contract, the question is what was the implied contract. If the circumstances were ordinary, we may well infer the usual towage contract; otherwise

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if the case is one quite out of the ordinary course. In this point of view the amount of danger may be important as a reasonable test of the probable contract. It is thus that I understand the case of *The Princess Alice*, 3 W. Rob. 140, and the others cited by the claimants. But here the evidence of the acts of the parties repels the inference of a towage contract, and so does the situation of the vessel: *The James T. Abbott*, 2 Sprague, 101; *The Reward*, 1 W. Rob. 174; *The Isabella*, 3 Hagg. 427; *The Charles Adolphe*, Swabey, 153. Speaking generally, it may be said, that the mere fact that a vessel is aground is enough to show that she is in a situation to have a salvage service rendered her. No doubt grounding in a tidal harbor or in the Mississippi river or some similar place, may often be in fact one of the ordinary incidents of navigation and not enough of itself to show danger or distress. But I apprehend it will be difficult to find an adjudged case of a vessel driven ashore in a gale of wind, and assisted while the gale is still blowing, in which any doubt has been expressed of her being in such danger as to be open to salvage.

The question of compensation remains; and this is always a nice and difficult question. Upon a careful examination of the evidence, I am satisfied that the property was in considerable danger, not of destruction, but of further damage. I cannot believe that the master felt then the confident security which he now testifies to. The gale was very severe, and the sea, considering the place, very high, three or four feet high, as the witnesses assert. It must have appeared to the master to be, and it was highly important that prompt relief should be afforded, not to save life, nor to save the ship from destruction, but to prevent damage to some extent to the vessel, and serious damage to the cargo of sugar, which, in case of a leak, must have been much injured. The aid was given with readiness and skill, and to so good purpose, that the small damage incurred is made a ground of argument to lessen its importance; and fairly, so far as it may tend to show that a longer stay on the beach would have had no very bad consequences, but no farther. On the other hand the risk was, as I have said, not of destruction, but of such damage as one or two hours more of pounding and straining might have caused. The bark was in a harbor within reach of assistance, and would in all

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probability have been gotten off at high-water, if not by her own crew, which I think she would not, yet by the aid of other vessels. The case of a vessel stranded in a thoroughfare, is to be distinguished from that of one on a lonely shore, where relief may not be expected, and where the first vessel that offers may probably be the only one available for the purpose. Upon this ground it has sometimes been said that a vessel abandoned in or near a much used harbor, could not be considered derelict in the strict sense. Neither was the danger to the tug very considerable. There was some danger, undoubtedly, arising from the high pressure of steam necessary to be used; and if this strain should break the machinery there would be great danger, but this was not very probable.

What then should be the reward? Where a vessel on shore in such a place as this in good weather is pulled off by a tug, it has been held that one fair criterion of the value of the service is what the tug would have undertaken to do it for, if payment had been made contingent upon success: *The James T. Abbott*, 2 Sprague, 101. It is obvious, however, that this rule will not answer for all, or most cases, because it takes into view only one side of the question,—the risk, labor, and expense of the salvors,—without regard to the value of their services to the other party. Where the necessity is more urgent, and no time is given to bargain, and to choose between different offers, another element, namely, what would the owners of the property be willing to give rather than that the service should not be rendered, may fairly be looked at. That a steamer, usually employed at remunerative pay, in towing about a harbor, does not stand precisely on the same footing in respect to salvage, as a vessel kept on purpose for saving life and property, nor as a merchant or passenger steamer deviating from an important voyage to give aid, must also be admitted: *The H. B. Foster*, Abbott, Adm. 222. And in this point of view some of the cases concerning tow-boats find their just application.

Taking into consideration all the circumstances, I have concluded that a fair and adequate remuneration for this salvage service is fifteen hundred dollars, which is nearly five per cent of the value saved.

Salvage decreed.

The D. P. (Kelley v. Thompson).

THE D. P. (KELLEY v. THOMPSON).

FEBRUARY, 1867.

The omission of the libellants to carry upon their vessel the side-lights required by statute, will not necessarily prevent a recovery of damages for collision. It is a fault which, if it caused or contributed to the collision, will bar the damages, or cause them to be divided, as the case may require.

It is not safe to rely upon the opinion of experts as to the course which a vessel took, when the opinion is founded on a very nice calculation of time and of angles, and is opposed to the clear testimony of eye-witnesses.

Upon the facts, *held*, that the libellants' vessel, which was without lights, was solely in fault, unless the accident was inevitable, and in neither case could the libellants prevail.

COLLISION. — The schooner *Romp*, loaded with iron, and bound on a voyage from Boston to Jonesport in Maine, was run into and sunk a few miles outside of Thacher's Island, Cape Ann, on the evening of March 16, 1866, by the schooner *D. P.*; and this libel was promoted by her owners for the damage. The night was very foggy, the wind about S.S.W.; the *Romp* was sailing on the starboard tack, with the wind free, heading about N.E. by E., and had no lights set. The *D. P.* was closehauled, on the port tack, heading about W. by S., with the red and green lights properly placed and burning brightly. The *Romp* had two men on the lookout, one of whom reported a light, and the master immediately came on deck and ordered his helm to be put hard down, at the same time hailing the *D. P.* to put her helm hard up. The only fact seriously disputed was, whether the respondents' vessel obeyed the order given from the *Romp*, or took the opposite course and luffed.

John Lathrop, for the libellants. 1. The fact that the *Romp* did not have the lights required by the act of congress, does not prevent the libellants from recovering, as the absence of the lights did not cause the collision. *The Panther*, 24 Eng. L. & Eq. 585; *Morrison v. Gen. Steam Nav. Co.*, 8 Exch. 733.

2. If the absence of lights did contribute to the collision, the libellants are entitled to recover half damages, the *D. P.* being also in fault. *Chamberlain v. Ward*, 21 How. 548.

3. The vessels were meeting end on, or nearly end on within the 11th article of the United States statute of 1864, c. 69, 13

The D. P. (*Kelley v. Thompson*).

stats. 60, and it was the duty of both vessels to port their helms. The evidence shows that the *Romp* ported her helm, and that the *D. P.* luffed instead of porting.

J. C. Dodge, for the respondents. We admit that the vessels were meeting nearly end on, but not that we omitted to port as soon as we heard the hail. If the *Romp* had carried lights, she would have been seen sooner. Having broken the law in this respect she cannot recover whether the *D. P.* was in fault or not.

LOWELL, J. Reasonable care and skill are expected of persons in charge of ships. The statute specifies some of the precautions proper to be taken by navigators, and leaves others, equally obligatory, to the common law of the sea. It is no bar to a recovery of damages in a case of this kind, that one of these precautions, whether imposed by the statute, or having a different foundation, has been neglected, unless the neglect caused or contributed to the collision: *Chamberlain v. Ward*, 21 How. 548.

The evidence in this case, on both sides, shows that the lights of the *D. P.* were seen before the hull or the sails of either vessel were visible from the other; and it is probable that if the *Romp* had had her lights, time enough might have been saved to have enabled the vessels to clear each other. If not, the disaster was inevitable, and in either case the libellants cannot recover, unless it be true, as they allege, that the *D. P.* luffed. All the witnesses on board that vessel deny it, and no one on the libellants' schooner, excepting the mate, is willing to say that he saw any change of that sort, though they argue that one must have been made. It is not probable that men who could see nothing, but only hear a hail to put their helm up, should at once proceed to put it down. The mate, who was examined several months later than the others, says he saw first the red and then the green light, but I find him not only unconfirmed in this, but contradicted by his own crew in one most material matter, and in several of less importance, so that I cannot rely on his evidence.

Some gentlemen of nautical experience have given it as their opinion, that if the vessels were meeting in the direction and at the distance supposed, and the libellants changed their course as they say they did, the vessels could not have come together if the *D. P.* had ported her helm. But the value of such an opinion

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depends on so nice a calculation of times, courses, and distances, that I should not feel safe in adopting it against the clear weight of the direct testimony of eye-witnesses. One of the experts said that a variation of half a point in the course of either schooner would make the difference between clearing and not clearing. I find that the respondents ported as soon as they had warning, and are not in fault.

It is admitted on both sides that the vessels were meeting nearly end on; but if they were not, the libellants would be no better off, because they had the wind free and must assume the burden of giving way.

The libel must be dismissed; and the allegation that the respondents' men wantonly or carelessly abandoned the boat of the lost schooner not being proved, costs will follow the decree.

Libel dismissed.

Affirmed by the circuit court, May term, 1867.

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FEBRUARY, 1867.

Section 15 of the act of 3d March, 1855, 10 Stats. 730, which enacts "that the amount of the several penalties imposed by the foregoing provisions . . . shall be liens on the vessel or vessels violating these provisions," does not apply to the fine imposed on the master by § 1 of that act, upon his conviction of a misdemeanor, but only to the civil penalties imposed on owners as well as masters, by §§ 2 and 8 of the act, for a violation of §§ 2, 3, 4, 5, and 7.

LIBEL of information by the United States against the brig Candace, alleging that the master took on board at a port in the Cape de Verd Islands, and brought to Boston eleven passengers, without providing them with the space required by St. 1855, ch. 213, § 1, 10 St. 715. The allegations were, that the height from the deck or platform on which these passengers were carried, to the deck above, was less than six feet, whereby the master became liable to a penalty of fifty dollars for each passenger so carried, amounting

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in all to five hundred and fifty dollars, and that the amount of this penalty was a lien on the vessel. The owners of the brig filed their claim and answer, in which, after requiring the government to make out the facts alleged, they denied, as matter of law, the liability of the vessel. It was proved that the passengers had only the height of five feet and one-tenth allotted to them, instead of six feet as required by the statute. The master had not been tried on the indictment pending against him for these breaches of the law.

W. A. Field, assistant district attorney, for the United States. The fifteenth section of the act provides, "that the amount of the several penalties imposed by the foregoing provisions regulating the carriage of passengers in merchant vessels, shall be liens on the vessel or vessels violating those provisions, and such vessel or vessels shall be libelled therefor, in any circuit or district court of the United States where such vessel or vessels shall arrive." This applies to all penalties of a fixed amount. The master, if convicted, could be fined no more and no less than fifty dollars for each passenger.

T. H. Russell, for the claimants. Admitting the facts to be as laid in the information, we object, 1. That the penalty imposed by the first section of the act does not apply to the height between decks, but only to the superficial area of deck; and 2. That before any penalty under that section can be recovered by libel against the vessel, the master must first be convicted and fined.

LOWELL, J. Upon a careful consideration of the statute, I am satisfied that the penalties referred to in section 15 are the numerous pecuniary penalties imposed by sections 2 and 8, and not the fines imposed by sections 1 and 6. By section 2, if the berths are not sufficient and suitable, the owners and master shall severally forfeit five dollars for each passenger, to be recovered by the United States in any port where the vessel may arrive or depart. By section 8, the owners and master shall severally forfeit and pay to the United States two hundred dollars for each violation of any one of three preceding sections, and fifty dollars for each violation of still another section, to be recovered in any circuit or district court within the jurisdiction of which the vessel may arrive or

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from which she may be about to depart, or where the owners or master may be found. It is clear that the fifteenth section gives a right of action against the vessel itself as well as against the master and owners personally, to recover these sums or any of them ; a point which was very doubtful upon those sections alone, because they do not, in terms, give an action against the vessel, though they do give jurisdiction to the courts of the district in which she may be found.

But to apply the fifteenth section to the fines which may be imposed upon the master when convicted of a misdemeanor under the first or sixth section is more difficult. In the first place, the penalty is or may be partly imprisonment. By the sixth section, for wilful failure to supply and distribute provisions, the master must be both fined and imprisoned, and both are discretionary with the court within certain limits ; and both together are spoken of as a penalty ; but it is a penalty which could not be enforced against a vessel. The case as applied to the first section is not so free from doubt ; here the fine is a fixed amount, and could be ascertained before conviction, and is called a penalty, and whether there shall be any imprisonment for a violation of this section is discretionary with the judge ; but if imprisonment is imposed, it is certain that both that and the fine are but one penalty for one misdemeanor, and no doubt they would have been so termed in this section if the context had required them to be mentioned together, as it does in the sixth section. It seems, therefore, that the penalty imposed by this section is not of a nature to be recovered against the vessel. But even if we could separate the punishment, and consider the fine by itself as the "amount of the penalty," referred to in the fifteenth section, there would be great difficulties and objections remaining. Suppose this fine to be recovered of the vessel in the first instance, how could the master on his trial for the misdemeanor avail himself of the fact ? Not in bar certainly, for it is neither an acquittal nor a conviction, nor does it go to the whole of his punishment. Or suppose the master tried and acquitted, how could that judgment avail the owners of the vessel in a civil suit for the penalty ?

Again, a lien is commonly, if not always, a security for a civil debt or responsibility, including civil forfeitures under the revenue

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laws. To hold a lien over the property of a wrong-doer as security for a fine which may be imposed upon him after conviction of the offence is unusual, and would not often be useful, because the defendant always stands committed until his fine is paid; and this is the highest security known to the law for any pecuniary liability; but that such a fine should be sued for before it is imposed, and against the goods of a third person, is surely without precedent. Again it is to be observed, that what I have called the civil penalties of sections 2 and 8 may be recovered by a personal action as well as by proceedings against the ship, and are imposed upon the owners, as well as the master; but the fines of the first and sixth sections are imposed upon the master only, and are to be recovered only by indictment, and no allusion is made in these two sections to any other remedy, nor to a proceeding in the district where the vessel may be found.

When, therefore, I consider the kind of penalty mentioned in the first section, which may be partly imprisonment, the person upon whom it is imposed, being the master only, the mode of its enforcement by a criminal trial and sentence, the absence of allusion to any responsibility of the owner or vessel; in all which respects it differs from the mere pecuniary civil penalties imposed by the other sections; and further that the ordinary office of a lien is to be security for a debt or civil liability, and the great difficulty of applying it in fact in aid of the criminal responsibility of a third person, and find that there are in the statute many civil pecuniary forfeitures or penalties to which the fifteenth section giving these liens is properly and exactly applicable; and that to the only other criminal penalty mentioned in the act, it cannot possibly be applied, before conviction of the master, because the amount is not fixed until then,—I am constrained to conclude, that it does not give a lien upon the vessel for the fines which may be imposed upon him for a violation of the first section of the act.

Decree for the claimants.

Affirmed by the circuit court, on appeal, May Term, 1867.

The Antelope. — Montgomery v. Tyson.

THE ANTELOPE. — MONTGOMERY v. TYSON.

FEBRUARY, 1867.

Seamen in the whaling service have a lien on the oil for their wages.

Seamen can be salvors only when their connection with the ship has been entirely broken up.

Daily wages which had been promised the crew for services in the nature of salvage were allowed, the owners not objecting.

Where, in the original articles for a whaling voyage, the time of its continuance, though agreed on, was accidentally omitted to be written out, the defect can be supplied by oral evidence.

Salvage paid by the master in good faith, and in the exercise of reasonable prudence, is a charge upon the oil in which the crew must share.

LOWELL, J. These two cases, which were tried together, were both promoted by the crew of the whaling bark Antelope; one for wages and salvage, brought against the oil which was saved and sent home from the wreck of the vessel, and the other against the master and owners for damages for alleged short supplies and other breaches of the contract or the duty of the respondents. The vessel, which was lost on the rocks of Nianteleck harbor, in Cumberland Inlet, on the night of the fifth of October last, had had a long and unsuccessful voyage, and had passed two winters in the ice. The amount of oil and bone taken were not sufficient to give either to owners or crew any thing like a fair return upon their respective outlays of time, labor, and money. These circumstances are not the most propitious for the harmonious settlement of any joint enterprise.

Taking first the libel that was first filed. It is clear that the libellants are entitled to the lays provided for in the articles. They contend for more, and say that the articles are void as not complying with the statutes, in this, that the voyage is not stated in them. It appears, that in the original paper the time to which the voyage was limited is not mentioned; but it is proved that the usage on this Greenland fishery, is, to stipulate for a term not exceeding thirty months; and that it was so understood in this case; and that the copy of the articles certified by the collector, which was taken in the ship, was so written out. How this discrepancy occurred is not shown, and there is no reason to suspect

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any fraud on the part of any one. Under these circumstances the omission may be made good by oral evidence: *Wickham v. Blight*, Gilpin, 452; *The Harvey*, 2 Hagg. 79. So far as statutes are concerned, there is none, I think, which regulates the shipping of men on whaling voyages, or requires the contract to be in writing; I mean the original shipment in the home port. Curtis on Merchant Seamen, 60; *Taber v. U. S.*, 1 Story, 1; *The Atlantic*, Abbott, Adm. 474; so that no question arises under the law making void shipments of seamen contrary to law.

Salvage the crew cannot have in whaling voyages more than in others, except in the few excepted cases, of which this is not one. *The Holder Borden*, 1 Sprague, 144. In one case like this, Judge Betts allowed the men a *per diem* compensation for work and labor: *Reed v. Hussey*, Blatch. & How. 535. In the present case it is admitted that they are entitled to such a compensation, under a promise of the master, the binding force of which is not disputed by the owners, though perhaps they might have set up that it was without consideration. When the wreck occurred, the crew, knowing that their interest in the catchings amounted to little or nothing beyond the advances and slops they had received, showed a disposition to refuse duty, and six of them actually deserted for a time; and the master promised the men they should have days' wages if they would work faithfully in saving the property. They did work for some eleven days, and I shall allow them for that time the highest rate mentioned by the master. They will receive fifty-five dollars each, excepting the six men above mentioned; and they, forty-five dollars each.

Some doubt was expressed at the argument whether the seamen can proceed against the oil in the hands of the owners. It has long since been settled that the property in the oil is wholly in the owners of the vessel; and that the lays of the crew are only a mode of arriving at their wages. Many important consequences have followed from this doctrine; one of which is, that the sailors, not being partners nor part-owners, may sue at law for their wages, and are not obliged to go into equity for a settlement of accounts. The crew always have a lien on the freight for their wages; and one usual mode of enforcing liens on freight, in the English practice, is by a warrant against the cargo, to detain it

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until the freight is paid into the registry : *The Ringdove*, Swabey, 312. Where the owners of the vessel own the cargo, they would be liable for a reasonable freight in all controversies and adjustments in which that question became important ; and no doubt the right might be enforced in any proper case against the cargo itself. In whaling voyages, it may almost be said that the cargo, to the extent of the owners' shares, represents freight exclusively, having been earned in a long cruise by the use of the vessel and her outfits. The doubt arises out of the terms of the articles, by which the owners have the right to sell the oil and bone. This agreement must undoubtedly confer upon them the right to give a good title, clear of all liens ; and they might probably sell the oil and bone before its arrival home. But, until a sale is made, I am of opinion that the seamen have a lien upon the oil. Judge Sprague appears to have understood the matter in this way in his remarks in *Hussey v. Fields*, 1 Sprague, 396 : and such a libel was brought in *Two Hundred and Ninety Barrels of Oil*, 1 Sprague, 475. If the question were between shipper and ship-owner, the master's lien for freight would be lost by any agreement in the charter-party or bill of lading inconsistent with his retaining the cargo for the freight. But the master's lien for freight has been decided by the supreme court of the United States to depend entirely on possession ; that of the seaman for wages has no relation whatever to possession, which he never has, either of ship or freight.

On the part of the crew, it is urged that the large payment which was made to the steamer *Wolf*, for assistance in saving the oil and transporting it and the crew to St. Johns, Newfoundland, ought not to be allowed as a charge against the gross proceeds, or what might otherwise have been the proceeds of the voyage. There can be no doubt that the services of the *Wolf* were salvage services, whether her crew took more or less part in getting the oil from the wreck, because it appears that there were no conveniences for storing or caring for the oil on the bleak shores of the country where the *Antelope* was lost : and no regular or reasonably certain means of getting it home ; and in a few days or weeks all intercourse with the wreck would be shut out for months by the ice ; and under these circumstances something more than mere freight would be allowed for the work actually performed by

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the steamer. The contract was made by the master of the Antelope, in good faith and for the best terms he could obtain, and he has actually paid the price. If there were any appearance of fraud, or of any underhand advantage accruing either to the master or owners, I should not hesitate to disregard the contract; for I shall adhere, until otherwise instructed by a superior court, to the doctrine laid down by Judge Sprague, in *Jay v. Allen*, 1 Sprague, 130, that the master is the agent of the owners, and that for his embezzlement or misfeasance in respect to the oil, they must be responsible to the crew. I am aware that some doubt was expressed upon this point by Mr. Justice Woodbury, in the same case, reported as *Joy v. Allen*, 2 Woodb. & M. 303; but it seems, on a careful examination of the judgment, that the decision did not turn upon this point; and there is reason to believe that Judge Sprague did not consider the point as definitively settled against his opinion.

The same doctrine is invoked by the crew in another way. They endeavor to show that the vessel was purposely cast away by the master; and aver that if this be proved the owners must bear all the expenses consequent upon his act. In the first libel the allegation is in the modified form, that the libellants aver and believe that the disaster was unnecessary and might have been avoided. The evidence fails to sustain this grave charge. It is shown that the vessel was but partially insured, and the cargo not at all; and that every possible present or prospective interest of the master as well as the owners was against the loss of the vessel, and no just cause of suspicion either of wilful or grossly negligent conduct is shown. On the contrary, the testimony confirms the statement of the libel, that there was a great and sudden increase of wind about two o'clock at night. There is some evidence on both sides that the watch were either inattentive or incapable; but there is none that the master is responsible for this. The attempt of the libellants to charge the master with so grave a crime upon the flimsy grounds brought forward in its support, tends to throw great doubt upon their own fairness as witnesses, and leads me to scrutinize their evidence with much care in other matters.

That the crew contribute to salvage in whaling and fishing voyages might be established by reasoning, were it not already decided. The contract of the owners to receive and transport the

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oil contains an implied exception of perils of the seas ; and it is only on what escapes such perils that the lays can be reckoned, and they therefore contribute: *Reed v. Hussey*, Blatch. & How. *ubi supra* ; *Utpadel v. Fears*, 1 Sprague, 559 ; *The Holder Borden*, *ubi supra*. The libellants will recover, in this case, their extra wages, and their lays, if any.

The judge then considered the second case, which turned only on points of evidence, and decided it for the claimants ; giving costs to neither party. *Decrees accordingly.*

F. W. Sawyer & E. H. Pierce, for the libellants.

T. K. Lothrop & W. W. Crapo, for the claimants.

CHARLES SAWYER ET AL. v. SAMUEL OAKMAN ET AL.

MARCH, 1867.

The owners of a dock are responsible for damage suffered by a vessel lawfully using the dock, and caused by a defect in the bottom, known to the owners of the dock and not known to the master of the vessel.

Where a vessel hauled into a dock in the harbor of Charlestown on a Sunday, against the law of the State, which prohibits work on that day, under a penalty, her owners are entitled to recover damages caused by a defect of the dock, whether they were suffered on the Sunday or on the next Monday.

The effect which the statute of Massachusetts, prohibiting work on the Lord's day under a penalty, shall have on the rights of the parties to a collision cause, pending in the district court, one of whom has violated the act in moving his vessel on that day, is not a question of the construction of the statute, but of the application of general rules of law to the case of a person who has violated such a statute, and the district court must follow the decisions of the supreme court of the United States, and not those of the State tribunals.

The case of *Philadelphia R. R. Co. v. Philadelphia Steamboat Co.*, 23 How. 209, decides that such a violation of a Sunday law is no bar to a proceeding for damages by collision.

LOWELL, J. The libellants are the owners of the schooner Bowdoin, and the respondents own a wharf and dock at Charlestown. In October last, the schooner, loaded with a full cargo of coal, arrived in port consigned to the respondents, and at the request of the latter, made fast at one of the piers of the wharf, and awaited for some days the discharge of two other vessels which had arrived at the berth. On Saturday, the master attempted to

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haul into the dock, which was then clear, but failed, and did haul in, at high tide, in the afternoon of Sunday. On Monday morning it was discovered that the vessel was badly hogged and strained, causing a damage estimated, in the libel, at ten thousand dollars, for which the owners are now proceeding. The libellants attribute the damage to the bad state of the dock, which, they say, had a large pile of coal in it and was otherwise dangerous. The respondents aver, that the injury resulted from the negligence of the master in not hauling to the place pointed out to him for that purpose, and in not putting in suitable fenders. It seems that the dock has two berths, of which the upper or inner berth is much shallower than the other, and is intended for vessels that take the ground at low tide; and the theory of the defence is, that the vessel lay partly in one and partly in the other, and so did not rest wholly upon the ground at low tide; and she had a considerable list outwards, or to port, which is alleged to have been caused by the master's negligence; and the damage is attributed, by them, to one or both of these causes. They further set up, as a matter of law, that the master, in removing his vessel on Sunday, was acting illegally under the statutes of Massachusetts, and cannot recover for any injuries received by or in consequence of doing such an act.

Much evidence has been given, on both sides, concerning the size of the pile of coal which had slid into the dock some days before. The witnesses for the libellants estimate it at twenty tons, and say it reached into the keel bed; while on the other side it is reduced to a very much smaller size, and said to have ended short of the place where vessels ordinarily lie. There has also been much controversy upon the question whether the master should have hauled farther ahead. It seems that he and the mate were told that they were to take the berth which the vessel just discharged, called the Daybreak, had occupied; and that a landing stage was pointed out to one or both of them as the point to which they were to bring the main-hatch of their schooner. This landing stage was movable, and after the Daybreak was discharged it was hauled inward from the edge of the wharf to allow her to pass out, and was twisted round so that its lower end was some feet farther down the dock than it had been when the Daybreak was discharging. To this end of the stage, as thus situated, the master hauled the upper corner or line of his

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main-hatch, which he says is a substantial compliance with the directions given him. Finally, it is said on the one side, that the listing of the vessel shows that the master had not put in suitable fenders, and that this may be one chief or even the sole cause of the strain to his vessel. On the other it is declared, that he put in the usual fenders, and that if larger fenders were required the wharfinger should have notified him.

Upon these much-contested points I am of opinion, upon the preponderance of the evidence, that the damage was probably caused by the vessel's resting on the pile of coal, though this point is by no means clear. But if not, yet that the master complied substantially with the directions of the wharfinger in placing his vessel as he did, and that he put in the usual fenders. He was not warned of any danger, nor that there was any reason for his hauling to any particular spot, except the convenience of discharging his vessel at that berth, which was the real and only object of the notice, nor of the necessity for larger fenders, and in hauling, as he did, to a place within reach of the landing stage and suitable for discharging, and in fending in the usual way, he exercised due care and skill; for I agree, that without special notice he would not be bound to more than usual care either in placing his schooner or in making fast.

It is clear, that if the vessel was properly navigated and made fast, the injury must have resulted from some defect in the respondents' dock, and this is hardly denied. Now, whether the defect was of the kind supposed by the one side or by the other, appears to me immaterial, because in either case the respondents must be presumed to have known of it, since the pile of coal had been there for some days, and the inequalities in the bottom of the dock for some years. And upon principles recognized alike at common law and in the admiralty, the owners of the dock and wharf making use of it for gain in the course of their business, would be liable for the damages arising from such defects to a person lawfully using the dock in the course of business and in the exercise of due care. *Philadelphia R. R. Co. v. Philadelphia Steamboat Co.*, 23 How. 209; *Parnaby v. Lancaster Canal Co.*, 11 A. & E. 223; *Mersey Docks Co. v. Gibbs*, Law Rep. 1 H. L. 93. It remains to inquire whether the libellants are in a condition to

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recover this damage. They hauled in on a Sunday, not at the end of a voyage, but in order to be in a position to save a tide on Monday. It is alleged in the libel that the position of the schooner was somewhat dangerous where she lay on Saturday, from which it might be inferred to be a work of necessity to move her. But the evidence does not bear out this allegation, and it was abandoned at the argument. Another objection taken is that the damage was not done on Sunday. It seems that the injury was not apparent to the master at ten o'clock at night, which was after low water ; the vessel, from the depth of her draft would be aground not only at low water, but during a great part of the rising and falling of the tide, so that she was in a position to suffer damage during several hours of Monday (which begins at midnight), as well as during a part of Sunday, and it is argued that I ought not to infer, in the absence of evidence, that the injury was, in fact, done on Sunday. I am much inclined to this opinion. But it may be doubted whether the burden of proof would not be on the libellants to show that they were lawfully using the dock when the damage was sustained ; and, if so, the mere absence of inference either way might not be enough for them, if the original act of hauling in on Sunday puts them in the wrong. It may be said that, as there was no appearance of strain or injury when the captain went to bed on Sunday night, and none such was discovered until six or seven o'clock in the morning, the inference may fairly be drawn that it occurred after midnight.

And this again may be so ; but as the question is one of fact, and in which there is great liability to mistake, I have thought it my duty to look at the point of law on the supposition, for the purposes of this opinion, that the damage was done on Sunday. It can hardly be denied that the act of hauling in on the Lord's day was an illegal act under the statute of Massachusetts, cited at the bar, which prohibits the performance of work and labor on that day, excepting in case of necessity ; and cases were cited from the Massachusetts reports more or less analogous to this, and especially the important and leading case of *Gregg v. Wyman*, 4 Cush. 322, which tend to show that a plaintiff who is obliged, as part of his case, to found himself upon such an act, cannot recover damages of a defendant who is likewise in the wrong. But without ex-

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amining the authorities, or the reasons on which they rest, with critical attention, and assuming that no action analogous to this could be maintained in the courts of Massachusetts, I yet feel constrained, whatever my judgment might be upon the question, if new, to follow the decision in 23 How. 209, above cited. That was a case very similar in its circumstances to this, and a statute of Maryland almost identical with ours was relied on, but the supreme court sustained the action. It is true that a doubt is expressed by the court, whether the act of beginning a voyage on Sunday was intended to be prohibited by the statute; but it is equally true that they express a very decided opinion, that, if it were, yet the action for damages against a wrong-doer would not be barred thereby.

And I do not feel at liberty to overlook one point of their opinion more than the other. Indeed, of the two, the latter doctrine appears to be the more relied on in the judgment. This is not one of those local questions in which the admiralty courts are bound to follow the State decisions. In the first place, the thirty-fourth section of the Judiciary Act of 1789, which provides that the laws of the several States shall be regarded as rules of decision in the courts of the United States, in trials at common law, does not in terms apply to trials in the admiralty; and on this ground Judge Story intimated an opinion that statutes of limitation would not bar actions in such courts, and this has remained the established doctrine, as appears, among other things, by the fact that State rules of evidence have never governed in the admiralty until the passage of a recent act of congress. So that the question which rule I am bound to follow, depends on whether this is a case which by general principles is governed by the local law. Now to the extent of holding that work done in contravention of the statute is illegal, it may be that the local law should govern, but the statute itself is silent concerning the legal consequences of doing such an act excepting to the extent of the penalty directly imposed. The effect which it may have on the wrong-doer's standing as regards third persons is no part of the construction of the statute, but the application of a general principle of law. Thus in *Gregg v. Wyman*, it was decided upon general principles, as derived in a great measure from English cases, that a wrong-doer could have no right of action when he was obliged to claim through his wrongful act. The fact that

The W. F. Garrison.

the act was prohibited by a State statute, had nothing to do with that part of the case; it might as well for all the purposes of the decision have been one which was illegal at common law or by a statute of the United States. This libel is for a marine tort, committed within the ebb and flow of the tide, and although within the body of a county, yet the rights of the parties depend upon the law as administered in the admiralty. To take a very common example, let us suppose that instead of an illegal act, contributory negligence of the master were shown, it is clear that the damages would be divided in this court, although by the law as administered in the State courts, the plaintiff could not recover any damages. For these reasons, it appears to me to be my duty, without discussing the main point upon principle, to follow the decision, or very strongly expressed opinion of the supreme court, and to pronounce for the damage. *Decree for the libellants.*

F. C. Loring & John Lathrop, for the libellants.

J. C. Dodge, for the respondents.

This case was taken to the circuit court, by appeal, and Mr. Justice Clifford being related to one of the parties, was certified to the circuit court for the second circuit, where the decree of the district court was affirmed by WOODRUFF, J., after the passage of the act appointing additional judges for the circuit courts.

THE W. F. GARRISON.

MARCH, 1867.

In salvage, when the benefit received will warrant it, the salvors will be entitled to share to a greater or less degree in that benefit. The compensation should include a gratuity or premium for the encouragement of promptness and gallantry, and is not based merely on the value of the respective vessels and the dangers to which each was exposed, or to the hardships undergone.

Services rendered after reaching a port of safety, in towing to a port where repairs could be made, are towage, and not salvage.

Where a valuable steamer went in search of a schooner reported to be disabled, and found her after five hours' search, and towed her to a place of safety in two hours more, and afterwards towed her into port, these services being done in the intervals of the steamer's usual employment, and the last service being towage worth one hundred dollars, and the value saved was \$11,000, the salvage awarded was \$1,700.

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SALVAGE. — Some hours before daylight, in the morning of the 28th of November last, the schooner William F. Garrison, on her voyage from Boston to the southward, in ballast, had arrived some ten or twelve miles to the westward of Gay Head, in Martha's Vineyard, and in trying to reef her mainsail in a heavy blow from the northwest was taken aback and lost her foremast and part of her maintopmast. The master rigged a stay from the mainmast head to the windlass and set one of his jibs, but was unable to work into Vineyard Sound, and brought up toward noon under the lee of the island of No-man's-land. He set a signal of distress and went on shore for assistance. He intended to go over to Martha's Vineyard to hire a steamer, but after engaging a boat and boat's crew, he thought the attempt too hazardous with the wind and sea as high as they then were. The wind blew from the north-west very heavily during the remainder of the day and some time into the night, and the schooner lay at a single anchor, and safely enough so long as the wind should remain in that quarter.

In the course of the day the signal of distress was seen by Mr. Smith, the underwriters' agent at Chilmark, and he went seventeen miles to Edgartown, and arriving at about 8 P.M. notified the agent of the steamer Monohansett of what he had seen, but did not describe the place where the schooner lay with entire accuracy. The steamer was fired up and sent to Holmes Hole, where her master lives, and he joined her and took command. The wind was still blowing heavily and there was considerable sea outside, and the weather was unusually cold for the season. The steamer ran down to the place where they understood the vessel to be, and did not find her, and occupied some time in searching for her. They found her at last, and on coming up hailed to know if the schooner wanted assistance, and the answer was that she did. The steamer sent a boat with four men to assist in getting the anchor, but it was disputed whether this was by request or not. The schooner was not short-handed, and there was no danger in this service, for the wind and sea had by this time moderated considerably. The anchor was hove up, and a line from the steamer made fast to the schooner, and before the towing had begun the captain of the schooner called out to know what the charge would be. Captain Cromwell of the Monohansett answered that

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he could not tell, but it would not be unreasonable. It was now about one o'clock at night, and the steamer proceeded to tow the schooner to Tarpaulin Cove, which is a safe harbor with good anchorage about sixteen or seventeen miles from No-man's-land. In the afternoon of the same day she towed her to New Bedford, where the repairs were made.

The Monohansett was a steamer valued by her owners at about seventy thousand dollars, employed chiefly as a passenger and freight carrier between New Bedford and Edgartown, touching at Holmes Hole and Wood's Hole. The trip was made once a day each way in summer, and in winter but one way on one day and back on the next. It was said that the steamer depended in part upon towage and salvage to meet her expenses in winter. The only other steamers in these waters were two tugs, one of which belonged to the libellants, and both had their headquarters at New Bedford, between thirty and forty miles from No-man's-land. It was said that one of these tugs appeared off No-man's-land soon after daylight the next morning after this service was rendered, and it was suggested that she came in search of a job in saving the schooner.

LOWELL, J. This is a clear case for salvage. No bargain was in fact made, and Captain Cromwell was not bound to make any in the dark, after he had come out so far to render a salvage service. Whether Captain Smith could properly and prudently have refused to employ him unless he would make one is another question not important here, though I do not see how he could well refuse. The only question then is of the amount to be awarded, and this is always a difficult and delicate question, and one in which it has been said that courts can hardly hope to do more than to give satisfaction in the long run. There is and can be no market value or fixed standard for the reward of services which are in themselves unusual, and of which the reward is not expected to be based merely on the value of the services in the particular case, but is to include a gratuity or premium for the encouragement of promptness, skill, and gallantry in future. The only standard that ever was set up, that of a moiety in cases of derelict, is found unsuited to modern times, and has been abandoned.

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The parties differ pretty widely in their views of this matter. The claimant has offered eight hundred dollars, and the libellants think they should have three or four times that sum. Nearly all the facts which must be considered in arriving at a judgment were disputed, but the trial has cleared up most of these disputes. It is now agreed that the value of the property saved shall be taken as eleven thousand dollars. The work in the afternoon of the next day was towage, and was worth about one hundred dollars. What the salvors did is not the subject of much doubt. They started out promptly and spent some five hours in reaching the schooner, and during a part of this time the wind was boisterous and the sea rough, so much so that there was some hesitation in proceeding; the steamer as I suppose not being well adapted to sea work; the navigation between the Vineyard and No-man's-land is intricate, insomuch that the master of the schooner seems to consider it the only real difficulty he was under. Excepting this, the towage from No-man's-land to Tarpaulin Cove was not difficult. In distance it was about sixteen or seventeen miles, and the steamer was employed in all in the strictly salvage service seven or eight hours. She did not lose her regular trips between Edgartown and New Bedford, but performed the salvage in the interval, and the subsequent towage in another interval, between two trips.

The main discussion at the last upon these subordinate points was concerning the degree of peril from which the schooner was rescued. She was safe while the wind was at the north-west, but a gale from any other quarter would drive her ashore or to sea, and in either case her situation would be very bad. With fair weather she might probably have been worked to some leeward port, and it would depend on the direction of the wind what port she could make; or her crew with the aid of the fishermen and pilots on the island, might have rigged a juremast; or the tugs at New Bedford might have heard of her. Making allowance for all contingencies, and taking the chances of the weather at that season, I cannot but consider the schooner to have been in considerable prospective danger and in urgent need of the services of a steamer when the Monohansett arrived.

I do not think the offer of eight hundred dollars was large



The Lovett Peacock.

enough. It is said that Captain Cromwell would probably have been glad to contract to do precisely what he did, for that sum or even less. This is not admitted by the libellants; but even if it were, it is not conclusive, because he did not make any contract. It was perhaps Captain Smith's misfortune or want of enterprise in the first instance which prevented a bargain being made; for if he had got over to Chilmark he could have gone to Edgartown, and might have bargained with somewhat more leisure; but as he did not, and as Captain Cromwell started without any certainty of finding the schooner, or of being employed if he did find her, he is entitled to whatever the service is worth as a salvage service. As I have had occasion to say before, the salvors cannot be held to receive only what the work was worth to them, any more than the owners are bound to pay all it was worth to them, which may have been immensely greater; as an argument and consideration tending to enlighten the court both can be shown, and where the benefit received will warrant it, the salvors will be entitled to share to a greater or less degree in that benefit.

Upon the whole, considering the great value of the steamer, the promptness and efficiency of the service, the benefit conferred, and all the other elements of the service, I think that I ought to award the sum of seventeen hundred dollars. It should not be paid over until it is certain that the crew of the steamer are entirely satisfied with their shares.

Salvage awarded.

W. W. Crapo, for the libellants.

J. C. Dodge, for the claimants.

THE LOVETT PEACOCK.

MARCH, 1867.

A bark fell in with a schooner three hundred miles from shore in distress. The bark sent provisions, which were returned; the crew of the schooner abandoned her and went on board the bark, which proceeded on her voyage for three hours, when the captain finding the weather more favorable returned to the schooner. The captain of the schooner not being able to induce his men to return to their vessel, the second mate and four men of the bark went with provisions and sails and brought the schooner to port.

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Held, not a case of derelict, as the final abandonment by the owners and the occupancy by the salvors were contemporaneous acts, and the one would probably never have happened unless in a situation where the other was possible, as the boat of the schooner could not take off all her crew.

The actual salvors succeeded in bringing in the schooner and cargo, valued at \$90,000, after thirteen days of severe labor and hardship, and after encountering a gale in the gulf stream. One-fourth of the value was decreed.

The first mate of the bark, who had refused to volunteer, was given the same share only as the other seamen who remained in the bark.

Distribution of the salvage.

LOWELL, J. On the afternoon of the twenty-first day of January, 1867, the bark *Flora Southard*, proceeding in ballast from Boston to Philadelphia, and having on board most of the supplies necessary for the voyage to Rio de Janeiro, which she had agreed to undertake from Philadelphia, and valued with her stores at about thirty thousand dollars, fell in with the schooner *Lovett Peacock*, in distress, in latitude $37^{\circ} 15'$ N. and longitude $70^{\circ} 30'$ W., some three hundred miles from any land. The schooner had a signal flying, and as the vessels came within hail, her master said he was short of bread, flour, and water, had lost his sails, and his crew were exhausted. The master of the bark replied that he could furnish him with bread, but that he had himself lost several sails; he lowered a boat and sent his mate on board the schooner with two barrels of bread, and with orders, as he testified, to inquire into the wants of the schooner, and to bring the master on board for consultation, if he wished to come. When this boat reached the schooner, the mate was told that he need not put the bread on board as the schooner was to be abandoned. The mate carried back to the bark a part of the schooner's crew, and the remainder followed with the officers and the captain's wife in the schooner's boat. When all had been safely received on board, the bark filled away and stood on her course, it being then about eight o'clock in the evening and the weather very threatening. At about eleven o'clock the master of the bark, finding that the wind was going down, put his vessel about and returned to look for the schooner, which had a very valuable cargo of cotton on board, appraised by order of court with the schooner at ninety thousand dollars and upwards. Before daylight in the morning the two masters went on board the schooner, and Captain McIntire of the bark was satisfied that

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she could be brought in. When they returned to the bark Captain Reagan of the schooner called his men aft and asked them to go in the schooner, and they refused. Captain McIntire then asked his own mate to undertake the service, and he refused; the second mate of the bark consented, and with four volunteers from the bark's crew went on board, with two barrels of bread and two sails, and after thirteen days succeeded in bringing the vessel into Holmes Hole in this district. During three successive days of the thirteen the schooner was obliged to lie to in the gulf stream in a severe gale, and the men were almost constantly at the pumps, the officer taking his turn with them both then and afterwards.

The disputed points were, whether the master of the bark took any unfair advantage of his position to obtain the control of the salvage enterprise, and how far the vessel was in peril, and what was the conduct of the schooner's master at the beginning and during the continuance of the salvage service. The master of the schooner swore that he was ready and anxious to proceed on his voyage, but that his men deserted him, and that even then all he wanted was men, provisions, and sails; that sails and men were refused him; that Captain McIntire exaggerated the damage to the schooner in order to discourage him while enhancing the value of his own services.

LOWELL, J. I am entirely satisfied that the imputations on Captain McIntire's conduct are untrue. The only foundation for them is the qualified refusal of sails on the first day, which is satisfactorily explained by Captain McIntire, and which I do not believe had any influence on the result. Upon all the evidence it is clear that master, officers, and men of the schooner thought it prudent and proper to abandon her. She had met a great deal of bad weather; had lost all her large sails, and one of her boats; was much strained and damaged in her upper works, so as to leak badly in heavy weather; her cabin and house were both so injured as to let in the cold and wet; her officers, and a double crew that she happened to have, were exhausted and disabled. Whether Captain Reagan ought to have despaired of his ship, while her hull remained sound, is a different question. His conduct is of importance chiefly in this respect, that if he was, as he would

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have us believe he was, the promoter of the salvage enterprise, and able and willing to lead it, and the bark's crew were willing to go with him, Captain McIntire certainly had no right to attempt to enhance the service by sending an officer who was not needed; and such conduct would diminish his compensation and perhaps that of his principals, the owners, though it might not affect that of the actual salvors who were no parties to it. This line of evidence, too, has a bearing upon the amount of peril, as it appeared to the parties at the time. The truth appears to me to be that Captain McIntire believed, and openly and without any concealment said, that the schooner could be saved; that in this opinion he differed from all the other persons who had any means of knowledge; that if Captain Reagan did not agree with the majority, he at least presented that appearance, which is all that is important in this case, as it is all that can affect the salvors.

Such being the state of affairs the question arises and has been earnestly argued, whether this is a case of derelict. I cannot think it was, because the final abandonment by the owners and the occupation by the salvors were contemporaneous acts, and the one would probably never have happened unless in a situation where the other was possible, since the boat of the schooner was not capable of taking off all her crew. So that the owners of the saved property must be credited with the chance, whatever it may have been worth, of the schooner making Bermuda, which she was undertaking to do when fallen in with by the bark, and not merely with the chance of a vessel abandoned on the high seas being picked up. I have always strongly insisted upon the distinction between a vessel disabled at sea and one abandoned there, and again between a vessel abandoned at sea and one abandoned on a frequented coast where assistance can be obtained, because an attention to these distinctions seems to me to reconcile many of the most apparently conflicting decisions upon the *quantum* of salvage. The true point here is, that not merely the risk the vessel is in of present or early damage or destruction must be looked at, but the peril that the owner is in of never recovering his property; so that I consider a vessel found floating at sea, however sound she may be and however fair the weather, is in the greatest danger of being lost to the owner; while a vessel

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much more shattered, with a crew still on board, though willing and anxious to abandon her if they could, is really in a more hopeful state, so far as the owner is concerned,—the accomplished fact of abandonment on the high seas, no matter for what reasons, being a most important one in this respect. Looking thus at the present case it does not appear to be one of derelict in the strictest sense, but it does appear to present a salvage service of a very high degree of merit. I cannot but look at the chances of safety from the point of view of the persons on the spot at the time; and I find that all of them, with the single exception of Captain McIntire (for his second mate had not been on board the schooner when he gallantly offered his services), despaired of saving the property. The plan was conceived by him, and was well and faithfully carried out by the second mate and the four men, with some risk and much exertion and fatigue, continued for thirteen days, and this very valuable cargo has been saved by their exertions from a peril which must by the consent of all be taken to have been very great; for Captain McIntire himself so considered it when he found how bad the weather was during the next few days; and every one else was of that opinion before.

It is therefore a case for very liberal compensation. And I consider that I do not go too far in decreeing, as I do, one-fourth of the net value, or twenty-two thousand five hundred dollars. The distribution will be governed by the circumstances of the case as applied to the general rules in salvage. The owners appear to be entitled to the usual share of one-third; the master, who was the only originator and instigator of the whole enterprise, and the second mate who conducted it to a successful conclusion, giving the work of his hands as well as of his head, and the men who were with him, are all to be highly considered. The men who remained on board the bark are entitled to some share, but they neither underwent the actual hardship and whatever there was of danger, nor were they exposed to much additional labor, for they had the assistance of the shipwrecked crew to some considerable extent in place of those who went in the schooner. The first officer who refused, as he had a right to do, to give the aid of his skill and experience, cannot expect much. Lord Stowell once refused to give any thing to a mate under somewhat similar cir-

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cumstances. But as the salvors have received the benefit of his services on board the bark, I shall give him the share of a man. The distribution then will be as follows:—

To the owners of the *Flora Southard*, one-third; to the master, one-sixth; to the second mate, one-ninth; to the four men, actual salvors, \$1100 each; to the six persons who remained on board the bark (exclusive of the master), the remaining sum of \$4350, to be divided between them in proportion to their wages, except that the mate is to rate as an able seaman only.

J. C. Dodge & T. K. Lothrop, for the libellants.

H. C. Hutchins & J. C. Carter, of New York, for the claimants.

PATRICK FLAHERTY & AL. v. VALENTINE DOANE.

MARCH, 1867.

The master of a fishing vessel had hired her of the owners for the season, and undertaken to pay the men, certain of whom were hired on wages. The vessel was lost during the season, and parts of her tackle, &c., were saved, and sold in Nova Scotia: *Held*, that the owners were liable to an action in the admiralty by the men for their wages to the extent of the proceeds of the sale of the wreck.

Whether the owners could have been sued personally for the wages if the vessel had returned, and the voyage had proved so disastrous as not to reimburse the great general charges, *quære*?

But the men would have had a lien on the vessel, and on her remnants, and they can follow the fund into the hands of the owners by a libel, and can recover to the extent of the proceeds of sale which have been remitted to the owners.

A fund arising out of a *res* upon which seamen have a lien can be followed in the admiralty, though the thing itself has been destroyed, or is out of the jurisdiction.

Whether such a proceeding should be in form, a proceeding *in rem* or *in personam*, *quære*?

LIBEL by seamen against the owners of the schooner *Edith*, for wages said to have been earned on a cod-fishing voyage. The evidence tended to show that the schooner was let to the master by parol, on his undertaking to give the owners one-fourth of the catchings, after deducting the great general charges. The master engaged two or three men on shares, and the remainder, who were the libellants, on wages of three hundred dollars for the season. The schooner was lost on the coast of Nova Scotia, about six weeks

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after she sailed from home, and parts of her tackle, rigging, and fish were saved and sold by the master in Nova Scotia. The master was to man the schooner; and the owners knew that some men would go on shares and some on wages. A paper was exhibited which purported to be shipping articles, conforming to the act of June 19, 1813, 3 Stats. 2, and made all the crew sharesmen, but it was not proved that the libellants ever signed it; nor did either party rely upon it in evidence or in argument; nor was it denied that these men were entitled to wages *pro rata* from the master who hired them. The evidence did not show that the men knew of the contract between the master and owners unless such knowledge was to be inferred from the usages of the business.

C. G. Thomas, for the libellants. In *The Adelphi*, decided by Judge Sprague, in 1862, it was held that the men have a lien on the vessel in exactly such a case as this. If so they have a personal action against the owners.

S. H. Phillips, for the respondents. The rule in personal actions is the same in the admiralty as at common law, that a plaintiff who founds his demand on a contract with an agent must prove the agent's authority. Here the master could not bind the owners, and their proceeding must fail. *Mayo v. Snow*, 2 Curtis, C. C. 102; *Webb v. Peirce*, 1 ib. 104. These were actions for supplies, but wages follow the same rule.

LOWELL, J. The decisions in the circuit court are, that, where the master of a fishing vessel becomes the owner for the voyage, the general owners are not personally liable for such supplies obtained in the home port, as the master had undertaken to furnish at his own expense. Mr. Justice Curtis, in giving his opinion in *Mayo v. Snow*, refers to the then unpublished decision of the supreme judicial court, *Harding v. Souther*, 12 Cush. 307, as not being inconsistent with this doctrine, for certain reasons which he gives; and it is not so, though for a different reason, because, as now appears from the authorized report, the master was not in that case owner for the voyage, as he was shown to be in the case in the circuit court. The supreme judicial court construed a certain paper as not amounting to such charter as would exonerate the owners; and the circuit court construed a certain

parol agreement to have that legal effect ; but the two were not alike. Mr. Justice Curtis, at the conclusion of his opinion in *Webb v. Peirce*, expressly reserves his decision concerning the right of seamen to proceed against general owners who have received freight earned on the voyage for which the wages are claimed. This case hardly comes within that reservation, in terms, though it may in principle, as I shall hereafter explain. Here the remnants saved from the wreck were not sufficient to reimburse the owners for the great general charges ; and therefore it cannot be said that they have received any thing in the nature of freight. If, therefore, this schooner had arrived safely at home, but had made a bad voyage, so that the owners were not made whole for their actual outlay, I assume that a personal action could not have been maintained against them for wages, according to the authorities which I am bound to follow, for it is admitted that the master was to pay these wages.

There is, however, a ground on which the seamen may recover the whole or a part of their wages. If the vessel had arrived they would have had a lien on her. No case has ever yet decided that seamen, hired by a charterer, lose their lien on the vessel. The contrary was held in *The Adelphi*, if the manuscript report of Judge Sprague's decision, produced at the hearing, is accurate, and I have no reason to doubt it. Admiralty liens depend more on services rendered the ship, than on any question of agency. Where the master is charterer and owner *pro hac vice*, he may impress the vessel with liens for supplies in a foreign port, *Thomas v. Osborn*, 19 How. 22 ; and this, although the material-man knows the master has taken her on shares, and is to victual and man her : *The Monsoon*, 1 Sprague, 37. So, in salvage there is usually no contract ; and, where there is one, the courts will often disregard it ; the lien rests on benefit conferred to the thing benefited ; and in salvage there can be no personal action against the owner unless he shall have accepted the property after the service has been performed. And a master *de facto* can give a valid bottomry bond.

There being then a lien on the ship, and of course on her remnants, and the wreck having been sold before the libellants had an opportunity to enforce their remedy, they may follow the proceeds

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into the hands of the owners, and maintain their libel to the extent of what I may call the assets. Proceedings *in rem* may be maintained, not only where there is a vessel or other thing which can be arrested by the marshal, but also where there is a fund in the possession of persons within the jurisdiction. In England, actions *in personam*, strictly so called, fell into disuse: *The Clara*, Swabey, 3; but an efficient substitute was found in the process *in rem*, which was served by a monition to the owners to show cause; and this was issued even though the vessel were on a voyage, or belonged to the crown, and therefore was not liable to arrest; or even in some cases though the vessel had been totally lost. Coote, Adm. Practice, 131, &c.; *The Trelawney*, 3 Rob. 216 n.; *The Meg Merrilees*, 3 Hagg. 346; *The Stephen Wright*, 12 Jur. 732. For this reason causes in the admiralty were always entitled as of a vessel or cargo, &c., for they were always *in rem*. The action *in personam* has been revived by the admiralty court act of 1861, but this is only a cumulative remedy, as I suppose, in cases where the old practice is applicable, for that practice was expressly sanctioned by the act of 1854.

The practice is not unknown in this country. We often require notice of the action *in rem* to be served by a simple monition, where there is no danger of loss by that form of proceeding and it is desirable to save the expense of custody. In prize, the court of the captor's country has jurisdiction, though the captured property has been sold abroad; and this is recognized by the prize act of 30th June, 1864, § 1, 13 Stats. 307. So in salvage and bottomry, in which there is usually no personal action against owners, the suit *in rem* is not defeated by the conversion of the property into money. In *Sheppard v. Taylor*, 5 Pet. 675, money paid by Spain for the wrongful confiscation of a ship, and for the loss of freight was permitted to be followed by a libel *in personam*, not only into the hands of the owners, but also into those of assignees, with notice. Mr. Justice Story, speaking for the court, says (p. 711): "Over the subject of seamen's wages, the court has an undisputed jurisdiction *in rem* as well as *in personam*; and wherever the lien for wages exists and attaches upon proceeds, it is the familiar practice of that court to exert its jurisdiction over them, by way of monition to the parties holding the proceeds."

This explains the meaning of Mr. Justice Curtis's reservation in *Webb v. Peirce*, above mentioned, that he will not say that owners who have received freight earned on a voyage are not answerable in the admiralty for wages; for such owners could be held to answer to the extent of the freight, by reason of the lien upon it.

The twenty-third admiralty rule of the supreme court requires all libels *in rem* to allege that the property is within the district in which the action is brought. No doubt this modifies the ancient practice so far as to establish the locality of certain actions which otherwise might have been brought in any district where the owners were found. But it cannot have been the purpose of the court to take away a right of action founded on the existence of a fund held by persons within the jurisdiction, and thus to overrule *Sheppard v. Taylor* by indirection, if that case should be called a suit *in rem*, which I doubt.

It is not necessary to put the rights of these libellants on the doctrine of salvage, that owners who have accepted the saved goods may be proceeded against *in personam*. The demand is really for wages, and the right to follow the proceeds into the hands of the owners by a libel is the same in both cases. It would be more regular that a full statement of the case, showing how and to what extent the owners are liable, should be made in the libel; but the trifling amount due in this case will hardly warrant the expense of an amendment; and I have not carefully examined the question whether one would be necessary, because the parties have argued the case on its merits, without interposing any technical objections. There is reason to suppose, that after advance wages and supplies have been deducted, but little will remain due to the libellants; but that little must be paid, if the proceeds of sale are sufficient.

Decree accordingly.

THE STROMLESS. — THE C. E. PAGE.

APRIL, 1867.

Where a schooner had grounded in the entrance to a dock, and a brig that was ready for sea undertook to haul by her after her officers were warned that there was not room enough, and became jammed, and both vessels were injured; *held*, the brig was solely to blame.

Demurrage is allowed in cases of collision for the time the injured vessel is necessarily detained, if she has lost employment.

A coasting schooner (collier) during the busy season may be presumed to have lost employment.

LOWELL, J. Cross-claims for damage to the schooner C. E. Page and the brig Stromless. In August, 1865, the schooner arrived at Boston with a cargo of coal, and attempted to haul in to Robbins's wharf. The dock which divides this wharf from French's wharf, which is next it on the south, narrows towards the harbor. The brig was lying near the end of French's wharf taking in ballast, and the people of the schooner were apprehensive that there was not room to pass, and asked to have the brig hauled up the dock a short distance, which was done. The schooner then attempted to haul in, but grounded in the narrowest part of the dock and stuck fast. The brig being soon after ready to go out tried to haul by, but was jammed between the schooner and the wharf, and when the tide fell both vessels were somewhat damaged. The mate of the brig was warned that there was not room enough, and knew that the schooner was aground.

J. C. Dodge, for the owners of the C. E. Page.

G. O. Shattuck, for the owners of the Stromless.

LOWELL, J. The grounding of the schooner appears to have been an ordinary accident of navigation, and one which had no direct tendency to cause the collision, because the officers of the brig were fully warned of it, and undertook to pass notwithstanding. However provoking the delay may have been, the brig, under these circumstances, went forward at her peril, and must bear all the loss, which, fortunately, is not large.

Demurrage is the principal item of the damages, and it is shown that three days were necessary for making the repairs. The rule is to give demurrage if the vessel has lost employment; and it

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seems a fair matter of inference that a coasting vessel of this character would obtain freights during the busy season of the year. We have no fixed measure of so much a ton for each day's delay, and I must rely on the evidence in every case, which in this points to forty dollars a day for this schooner.

Damage pronounced for.

BOWLEY v. GODDARD (THE CORINGA).

JUNE, 1867.

A steamer was engaged by the underwriters' agent to go to a vessel in distress with the understanding that her time and services should be liberally paid for if they were accepted and were successful, which they were. *Held*, the agreement was for salvage.

A steamer was owned by the underwriters of Boston and was usually employed on salvage duty by special contract. Her officers and men were paid by the month, and had no right to demand more than their regular pay if they performed salvage services. *Held*, these facts constituted no answer to a demand for compensation reckoned upon the liberal basis of salvage, by the steamer when she was engaged to perform a salvage service by a ship not underwritten by the owners of the steamer, and without any special contract.

As between a ship so saved and the officers and crew of such a steamer, the latter are volunteers though paid by the month.

The value saved is not a very important element in awarding salvage when the danger is not immediate, and the situation of the saved vessel is such that other assistance might probably have been rendered if that of the actual salvors had not been accepted.

On a value of \$160,000, \$5,500 awarded to the two steamers.

THE ship Coringa on her voyage from Calcutta to Boston with a very valuable cargo, — ship, freight, and cargo being worth about \$160,000, — lost her rudder head when near Cape Cod, and became nearly or quite unmanageable. Her master brought her to anchor off Nauset Light, about two miles from the beach, on the morning of Monday, the seventh of January, 1867, and set his colors union down. He refused the offer of the steamer Roman, of the Boston and Philadelphia line of packets, to tow him in, because the master would not disclaim salvage. In the course of the forenoon the underwriters' agent at Provincetown learned that there was a vessel in distress, and engaged the steamer George Shattuck to go to her

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assistance. This steamer plies between Boston and Provincetown twice a week each way, as a freight and passenger steamer, and sometimes tows vessels. The wind was so high from the northward and westward that the regular trip of the Shattuck had been postponed, and her master was disinclined to go to the assistance of the Coringa, but was induced to do so by a representation that life might be in peril. The underwriters' agent, with a whale-boat and some hands hired for the occasion, in addition to the crew and equipment of the steamer, went in her. They found the ship soon after dark on Monday, and were asked by the master to lie by him, to which they consented. The wind continued to blow so strongly for nearly two days that the steamer was not thought adequate to tow the Coringa to a port of safety, and she lay by, with fires banked, ready to give what aid she could in any emergency, and to tow the ship when the weather should moderate. In the afternoon of Wednesday, some forty-four hours after the arrival of the Shattuck, the powerful tug-boat Charles Pearson, owned in whole or in part by the insurance companies of Boston, and generally known as the underwriters' boat, came in sight, towing the dismasted bark Suliot from Provincetown to Boston. At the request of the master of the Coringa, this tug after some hesitation undertook to tow the ship. The George Shattuck assisted, and all four vessels were made fast together, and proceeded towards Boston in the following order: the George Shattuck, the Charles Pearson, the Coringa, the Suliot. The wind increased again and for some hours after nightfall, while going from Highland Light to Race Point, their progress was very slow. At last the bark parted the hawser by which she was made fast to the ship, and struck adrift. The steamers put back and found her in danger of going ashore, and the George Shattuck then made fast to the bark and brought her to Boston, while the Charles Pearson brought up the Coringa; and both arrived in safety during the forenoon of Thursday.

The owners, officers, and crews of the two tugs joined in this libel as alleged salvors of the ship and cargo. The owners of the property set up that the contracts were for towage services only.

Mr. Smith, the underwriters' agent, called by the libellants, stated in his cross-examination that the arrangement with the

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master of the *George Shattuck* was, in substance, that the steamer should be liberally rewarded for her time if her services were actually used and were successful, and his understanding appeared to be that the precise amount of this reward should be for the underwriters to determine. He said further, that the insurance companies of Boston had furnished him with a sum of money to be invested in this steamer when she was built, and that he has always owned a small share in her, and that his arrangement with the managing owner and with the master when he took this interest in the steamer was, that he should be at liberty to employ her on salvage service at something less than salvage remuneration. The master and managing owner denied that there was any general arrangement or understanding of this sort, and the master denied that there was any special arrangement in this case.

The officers and crew of the *Charles Pearson* were hired by the month, and their contract required them to perform duty in saving vessels, without further or other compensation. The steamer usually made a special contract in each case for payment by the day, the hour, or the job; and when this has not been done, her services have usually been settled for upon similar principles, that is to say, upon a consideration of her services, expenses, risk, &c., rather than upon a basis of salvage in any more enlarged sense.

The master of the *Coringa* made no bargain with either steamer; but he testified that Mr. Smith informed him on Wednesday morning that he had engaged the *George Shattuck* as underwriters' agent, and that no advantage would be taken of the ship's situation; and that in asking the aid of the *Charles Pearson* he knew he was dealing with the underwriters' boat, and inferred that salvage would not be demanded, though his vessel was not underwritten by any of her owners.

B. R. Curtis & E. Merwin, for the respondents. The express contract in the one case, and the implied contract in the other, were for a *quantum meruit* compensation.

H. W. Paine, for the *C. Pearson*.

J. C. Dodge, for the *G. Shattuck*.

LOWELL. J. There can be no doubt, and none is suggested, since the evidence has been put in, that the services rendered were

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in the nature of salvage ; but it is contended that salvage compensation is waived by the situation and acts of the parties. The presumption is, that such services were rendered for a salvage compensation ; but this may be rebutted by evidence : *The Versailles*, 1 Curtis, C. C. 353 ; *The Independence*, 2 Curtis, C. C. 350, 357. In the latter of these cases, Mr. Justice Curtis says, " What I decide is, that to bar a claim for salvage, where property in distress upon the sea has been saved, it is necessary to plead and prove a binding contract to be paid, at all events, for the work, labors, and service in attempting to save the property, whether the same should be lost or saved."

Tried by this test, there is no bar here, because neither steamer was to be paid unless successful. This test, indeed, is not conclusive, because there may be a contract for towage contingent, as most maritime contracts are contingent, upon the successful prosecution of the enterprise, and there may be a valid contingent contract fixing the amount of salvage ; and either of these would preclude the assessment of damages by the ordinary rules of salvage. This is all that can be meant by a contract to bar salvage, for an admiralty court at the present day has undoubted jurisdiction of contracts of this kind, and such an one, if proved, would be no bar, but would only regulate the damages. The courts do not interfere with the liberty of contracting in such cases, excepting to see that it is not abused. If neither fraud, nor oppression is shown, the bargain will be upheld, though it be contingent, and be for a sum much less than the court would have awarded : *The Catherine*, 6 Notes of Cases, Supp. xliii. ; *The Mulgrave*, 2 Hagg. 77 ; *Bondies v. Sherwood*, 22 How. 214 ; *The True Blue*, 2 W. Rob. 176 ; *The British Empire*, 6 Jur. 608 ; *The A. D. Patchen*, 1 Blatch. 414 ; *The Helen and George*, Swabey, 368 ; *The Enchantress*, Lush. 93 ; *The H. D. Bacon*, Newb. 280. The contract must not only be fairly and honestly made, but the evidence must show a definite and explicit bargain. Mere loose talk will not do ; *The Salacia*, 2 Hagg. 262. It is not unusual for masters in their laudable zeal for the interests of their owners, not only to underrate the service after it has been performed, but to fasten upon some expression of the salvors, such as that they would be reasonable in their charges, or the like, as bind-

ing them not to claim salvage. The objection to the allowance to the George Shattuck rests on such a statement; but in the evidence I find nothing which should have that operation. Granting that Mr. Smith's version of the conversation should be accepted without qualification, and that of the master should be wholly rejected, yet the engagement merely was that the steamer should be paid liberally if her services were accepted and were successful. But this must mean that the pay should be in some degree proportional to the success, because, if by great exertion and at great expense, only a small value had been saved, liberality contingent on success could not require a payment exceeding the value rescued; and the converse must hold in favor of the steamer; and this is salvage. Mr. Smith's understanding probably was, that the underwriters' estimate of liberality should be the final measure of its amount; but this cannot be accepted as a legal measure to render the contract either fair or explicit within the law. If an agreement to refer the amount to arbitrators will not bar a libel, much less would one which leaves the adverse party to be the sole judge of the controversy be such a bar. If the true construction of the conversation shows an agreement not to enhance the compensation if the ship should turn out to be a very valuable one, — and I am much inclined to think this is the real meaning of it, — that is no more than I should apply as the rule of damages in a case of this kind, for I have always considered that a vessel merely disabled, but in no immediate peril, and lying near a port from which assistance may be readily obtained, is to have the advantage of her situation, and to be presumed to take the first tug on substantially the terms that she could have had the next one for. In other words, that while such a service is salvage, and is to be compensated much more liberally than mere towage, yet, the peril not being immediate, the value saved is not so important an ingredient as in cases of more urgency. The service in such a case undoubtedly approaches much more nearly to a towage service than when the vessel is derelict at sea, or in any other desperate circumstances.

The Charles Pearson made no contract, and I am asked to infer one. I should be slow to conclude from circumstances alone, that a salvage service was undertaken for a mere *quantum meruit*. I

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recall no case in which such an implication has been made, and none has been cited. The officers and men of this steamer are paid by the month, and their wages are in full for all services of every kind. This is all that appears. Whether the pay is larger than ordinary wages, whether the contracts are binding on the men, these questions cannot be answered from the evidence before me; but this I hold to be plain, that these officers and men owed no duty to the respondents, and when they saved their property, were volunteers *quoad* them; what their rights may be among themselves does not concern the respondents. I cannot say that this fact bars the salvage. Nor do I see that the mode in which the managers of the steamers usually dealt with other persons constitutes an advertisement to the world that they were ready to undertake salvage services for towage wages. It is true, probably, of most tugs, that they are ready to make a bargain for any kind of service, and that from their position in a seaport town, in the presence of an active competition, they will usually be obliged to make one or lose the employment. Still, I do not know, and am not instructed that there is any fixed rate of compensation based on any thing like a mere *quantum meruit*. I suppose that many of these bargains must be, in effect, agreements for a fixed amount of salvage, approaching more or less nearly to what would be awarded by a court of admiralty. However this may be, this case does not find an agreement between these parties, express or implied, for mere towage. The master of the Charles Pearson could not have so understood it, because he would have had no right to undertake such a service without the consent of the master of the bark Suliot, which he already had in tow; and there is no evidence of any such assent; but in a case of salvage, he might well, under some circumstances, perhaps under these, considering the great value of the Coringa and her cargo, which appears to have been much greater than that of the Suliot, take the chances of damage to the Suliot, trusting to indemnity by way of salvage from the very valuable property in jeopardy.

I am of opinion, therefore, that both steamers are entitled to a reward, to be adjudged by a court of admiralty upon the principles governing cases of salvage. The question of amount is always

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nice and embarrassing. In this case, I find that the ship was not in the most imminent and pressing danger, but was lying where communication could be had, and was had, with her owners, and where assistance from other steamers might probably be availed of. It was on these grounds, no doubt, that the master refused the assistance of the steamer Roman; he had a right to consider that such a vessel, large and valuable, bound on an important voyage, with passengers and cargo, might properly demand a high rate of salvage, and being in no instant danger, he preferred to wait, if he could not make a definite bargain. I have already said that, in such a case, what may possibly be called a salvage *quantum meruit*, that is, a large and liberal compensation for what the work was worth to the steamer, without a very nice regard to value saved, should govern the salvage award. I find that the George Shattuck contributed nearly three days' time, with some trouble and discomfort to her crew, and some derangement, I suppose, of her ordinary business. The Charles Pearson gave a more valuable, powerful, and efficient vessel, and performed the greater part of the actual towing, but with much less time, and that already paid for, but with some risk of damage to the bark under her charge. Upon the whole circumstances, I have thought right to award to the George Shattuck three thousand five hundred dollars, and to the Charles Pearson two thousand dollars.

There was evidence that the broken hawser belonged to the ship, and was new and of some value, but how it came to be used or to be broken I am not informed, and the facts proved are not sufficient to enable me to say that the steamers, or either of them, should bear the loss. Upon this point I am willing to hear evidence before a final assessment of the damages, if any party desires it.

Salvage decreed.

Re James L. Fowler.

Re JAMES L. FOWLER.

JUNE, 1867.

A debtor over whom the court has jurisdiction commits an act of bankruptcy when he files his voluntary petition for adjudication, and a single creditor cannot resist the adjudication by plea and proof that the debtor is really able to pay all his debts.

If the debtor has property concealed, the assignee is the proper person to recover it for the benefit of the general creditors.

Such a concealment would be itself an act of bankruptcy, and is no ground for refusing to adjudge the debtor a bankrupt on his own petition.

The cases in which creditors may resist an adjudication are where there is some defect in the proceedings, or the court has no jurisdiction.

A petition by one partner against another is *quasi in invitum*, and the objecting partner may show that the firm is not insolvent; though in such a case, if creditors intervened, perhaps the court might require security to be given for the payment of the joint debts before dismissing the petition.

BANKRUPTCY.—James L. Fowler filed his voluntary petition early in June, being the thirteenth case begun under the act, and before adjudication one of his creditors filed written objections to the petition, setting out that Fowler was not unable to pay all his debts, and that his only object was to delay him in the collection of certain executions which he held against Fowler. The question whether these objections if well sustained in fact were sufficient in law to prevent an adjudication, was heard by the court.

R. M. Morse, Jr., for the creditor. The district court has full equity powers under the statute, analogous to those which the supreme judicial court of Massachusetts exercised under the insolvent law. It will stay proceedings that are improperly brought, as that court has often done: *Thompson v. Thompson*, 4 Cush. 127. That the allegations of the petition may be contested, see *Holbrook v. Jackson*, 7 Cush. 136, remarks of Shaw, C. J.

A. Wellington, for the bankrupt.

LOWELL, J. The district court has power to hear and decide all contested questions, and to stay proceedings improvidently begun. The eleventh section of the statute seems to contemplate that voluntary petitions may sometimes be contested, for it provides that the register may make adjudication if there be no opposing party. But it is not the intent of the act that the court

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should inquire whether the petitioner is insolvent or not. When a debtor swears that he is unable to pay his debts in full, and files the requisite petition and schedules, he has committed an act of bankruptcy, and any creditor may then carry on the proceedings if the debtor shall fail to do so. His act is for the benefit of all persons interested, and cannot be retracted on the application of only one of them, with or without the debtor's consent. No notice is required to creditors before adjudication, and the judge or register is only to inquire whether the debtor owes three hundred dollars; § 11. That he is unable to pay his debts in full and is willing to surrender all his property is conclusively proved by his petition, so far as a decree of bankruptcy is concerned. He may be, in fact, fraudulent, and able and unwilling to pay his debts; but the law takes him at his word, and makes effectual provision, not only by civil but even by criminal process to effectuate his alleged intent of giving up all his property. If I should undertake, on a preliminary hearing, to decide that the petitioner has ample means to pay his debts, but is unwilling to discover them, and should dismiss the case on that ground, I should be usurping the province of the assignee, and should surrender the very powers and remedies which the bankrupt law provides for that exigency; besides giving the single creditor, who objects in order to save some attachment or security, an advantage which the law intends to avoid. The only questions open upon a voluntary petition are those which go to the jurisdiction, such as residence, and a sum total of provable debts of three hundred dollars. It is these which § 11 refers to as being possibly contested. So where one copartner petitions and another copartner resists, the latter has an interest to retain his own property, and may show that the firm is not insolvent. A creditor has no such interest in his debtor's property as a partner has in that of his firm. His rights, except where they tend to give him a preference over the general body of creditors, are fully secured in bankruptcy. And even in case of a partnership, the court might perhaps have power to order security to be given for the payment of the joint debts before dismissing the petition.

If this creditor were the only one, and the petition were intended merely to vex and hinder him, or if all the creditors joined in a protest, and were ready to discharge the debtor, there might be

Ex parte O'Neil. — Re Fowler.

some ground to stay the proceedings; but to do it at the instance of one out of several, on the ground that the debtor has undisclosed assets, would be contrary to the whole spirit of the act. There is no such effectual mode of obliging a fraudulent debtor to do justice to all his creditors, as to proceed against him in bankruptcy, and the law does not intend that he should do justice to less than all. The only objection made to this adjudication is one which, if true, would be a sufficient reason for adjudging the debtor a bankrupt, namely, that he has property concealed which ought to be used in payment of his debts. Such a fact is evidence of insolvency as well as bankruptcy, and if other evidence than the debtor's petition were admissible, would tend to confirm rather than to disprove the allegations of the petition.

Adjudication ordered.

Ex parte O'NEIL. — Re JAMES L. FOWLER.

JULY, 1867.

When a judgment-debt is offered for proof against the estate in bankruptcy of the debtor, whose petition was filed after the date of the judgment, it may be objected to by other creditors on the ground of fraud or irregularity, including fraudulent preference, for they are not parties nor privies to the judgment, and may impeach it collaterally.

But the consideration of a judgment regularly obtained in a court having jurisdiction cannot be collaterally inquired into in bankruptcy, except for fraud.

The costs and interest are, in such case, a part of the debt, and can be proved.

BANKRUPTCY. — The register took evidence touching the right of O'Neil to prove the amount of a judgment which he had obtained against Fowler before his bankruptcy, and ruled *pro forma* that the question whether all just credits had been given by the creditor before obtaining his judgment could not be inquired into. He certified that question to the court, and also whether interest and costs could be proved.

A. Wellington, in opposition to the proof. A judgment is only binding between parties and privies; it may be impeached collaterally by third persons: *Denison v. Hyde*, 6 Conn. 508; *Shrewsbury v. Boylston*, 1 Pick. 105; *Downs v. Fuller*, 2 Met. 135.

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R. M. Morse, Jr., for O'Neil. This is not a case in which a court of equity would enjoin the judgment, and therefore this court will not interfere. *Ex parte Mudie*, 3 M. D. & De G. 66.

LOWELL, J. Creditors, whose interests are affected by a judgment against their debtor, may avoid it collaterally, because they have no right to have it reviewed directly: *Pierce v. Jackson*, 6 Mass. 244; *Downs v. Fuller*, 2 Met. 135. In bankruptcy the creditors are interested in contesting a judgment which is offered for proof in competition with their own debts; and I have no doubt they may show, by any appropriate evidence, that the judgment is void or voidable for fraud or irregularity. A debtor might suffer judgment against him for the very purpose of affecting the proceedings in bankruptcy; or a judgment may be obtained for a just debt, but under circumstances which would make it a fraudulent preference. In all such cases it must be open to other creditors to object to the judgment when offered for proof against the assets. On the other hand, where the court rendering the judgment has jurisdiction, and there has been no fraud and no preference, no one can examine into the consideration of a judgment, and show by evidence, outside of the record, that the judgment ought not to have been rendered, or not for so large a sum. While the debtor is not bankrupt nor acting in contemplation of bankruptcy he binds all the world by his acts and omissions in relation to his own affairs; and if he does not choose to defend an action to which he has a legal defence, and of which he has had full notice, his estate will be committed by his act or neglect, just as it would be by any improvident bargain he might make, or by any new promise to pay a debt barred by the lapse of time or a former discharge in bankruptcy.

When, therefore, the judgment is either void or voidable as of right by the debtor or by creditors, it may be examined into here if offered for proof; where it is valid as against the debtor, and no fraud on creditors is shown, it is valid here. If there be an intermediate case, in which it would be discretionary with the court which rendered the judgment to vacate it upon the ground of mistake, I should probably leave the assignee to pursue that remedy, postponing the proof in the mean time.

It was said in argument that the English practice goes farther

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than this, and permits the creditors to inquire into the consideration of all judgments. Some statements as broad as that may perhaps be found in the text-books; but I suppose the English practice, whatever it may be, is founded on the consideration that courts of equity may in many cases re-examine judgments at law, and grant new trials or restrain executions. See *Ex parte Bryant*, 1 V. & B. 211; *Ex parte Marson*, 2 Dea. 245; *Ex parte Prescott*, 1 M. D. & De G. 199. If this is the reason of the practice, it should not extend beyond the limits that I have laid down; for a court of equity would certainly not stay an execution where the party had had ample opportunity of defence, and there was no fraud.

There being in this case no offer to prove fraud or irregularity, but only an excessive assessment of damages, I must reject the evidence, and admit the proof for the full amount of the judgment.

The costs are part of the debt and can be proved, judgment having been recovered before the bankruptcy; and so can the interest, which, by a statute of Massachusetts, all judgments bear.

Debt admitted to proof.

THE JAVA.

OCTOBER, 1867.

A collision occurring in the daytime may possibly be an inevitable accident.

Where a steamer in navigating a crowded harbor at a very slow rate and with a sufficient lookout, ran into a small schooner which could not be seen in time to avoid her by reason of the hull of a large ship behind which the schooner was getting under way without her sails being yet up, and the channel was a part of the fair-way of the harbor: *Held*, the steamer was not in fault.

LOWELL, J. The libellants were the owners of a valuable cargo of linseed which was shipped on board the schooner *James McCloskey*, bound from Boston to New York. The schooner was towed from one of the wharves in East Boston into the stream, and was getting under way near the schoolship *George M. Barnard*, and had only a part of her foresail hoisted, when her master saw the large Cunard propellor steamer *Java* coming round the stern of the schoolship and making directly for the schooner. The

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schooner's helm was put hard astarboard, but the steamer struck her abaft the main rigging and knocked a hole through her, and the linseed was damaged to the amount of some seven thousand dollars.

There is no doubt or question concerning most of the facts of the case. The weather was clear and fine, with a good breeze, the precise direction of which is not important; the time about one o'clock in the afternoon, the tide an early ebb, and neither vessel was seen from the other until just before the collision. The questions which arise are, whether, under the circumstances, either or both vessels were guilty of any negligence which caused or aided in causing the collision.

The burden of proof is on the steamer. And the first question is, whether her lookout was sufficient. It is shown that she had three persons properly stationed forward on the lookout, and the evidence is, on the whole, clear and decisive that they were vigilant and discovered the schooner, not only as soon as she discovered the steamer, but as soon as with reasonable diligence they could have discovered her. It appears, too, that the steamer was proceeding very slowly, having stopped her engines some little time before to make sure of clearing another vessel, and that upon the schooner being seen, prompt and efficient measures were taken to clear her, but that it was too late.

The allegation to which most of the evidence and arguments have been addressed is, that the Java was in the wrong in attempting to pass on the inner or East Boston side of the schoolship when and as she did. It appears that the George M. Barnard is a large vessel, high out of water, which is kept constantly moored during the winter months near the edge of the channel, leaving as much room as possible on the outside between her and Boston, and only a narrow passage on the other side, so that a vessel of the size of the Java could not pass there excepting at or near high-water. There was evidence tending to show that the Cunard steamers rarely do take this passage, though other vessels nearly as large do so not unfrequently, and that it would not be considered prudent for so large a vessel to attempt it when it was much obstructed. The fact that vessels of large size do or do not frequent the place is of little importance compared with more direct and pertinent evidence

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concerning the safety of the passage itself. That Cunard steamers rarely go there might be material in ascertaining whether the schooner in getting under way in that part of the channel had any reason to expect to meet the steamer there, and so bear upon the diligence or want of it on the schooner's part, and upon that ground I admitted this testimony; but it has not become material to the decision of the cause. Upon the whole evidence I am satisfied that a prudent and skilful navigator would not hesitate to take the Java through that passage at that state of the tide, if he saw no obstructions, as of vessels at anchor, or the like.

It is said that if the steamer had taken a course more nearly parallel with that in which the schoolship was lying, she would have seen the schooner earlier, and might have avoided her; and this is true. But whatever direction she had taken the schoolship would have shut out some points of the compass, and there was no reason to apprehend danger from one point more than from another. The case is simply one of running under the stern of a vessel at anchor at a somewhat acute angle, and I am not prepared to say that this is bad navigation, if it be done as slowly and with as much vigilance as is shown in this case. A man may drive round the corner of a road if that is the most convenient way home, though he ought to do it slowly and with more than ordinary care if he cannot see what is on the other side. The failure to see the schooner probably arose from the fact that her sails were not set. I am not prepared to say that this was a fault on her part; but it was her misfortune.

A consideration of a good deal of weight with my mind in one aspect of the case is this: That the collision does not appear to have been affected in any degree by the narrowness of the channel. The steamer was simply coming out from behind the schoolship in one direction and the schooner in another, and however wide the channel might have been, the former could have done no more than she did. She took the proper measures promptly and without the slightest embarrassment from the narrowness of the passage between the ship and the flats, which in fact she had scarcely reached. So that I cannot see that the propriety of the steamer's course, considered with reference to the peculiarities of this passage, has much importance in the case. Nor is the fact that she

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intended to go to the Cunard dock very important, because she was not heading for the dock when the collision happened. It seems that the accident might and would have happened just as it did if the steamer had been going to any other dock, and the schoolship had been anchored in mid-channel, provided the relative position of the three vessels had been the same. So that it comes back, as I have said, merely to the question of running under the stern of a vessel at anchor at an acute angle. And I cannot say that any negligence has been shown on the part of the officers of the steamer, but must hold that this accident, though occurring in broad day, was what the law terms an inevitable misfortune. The distinction between this case and *Crockett v. Newton*, 18 How. 581, is precisely in the sails of the schooner not being visible over the schoolship.

Decree for the claimants.

R. H. Dana, Jr., for the libellants.

W. G. Russell for the claimants.

Reversed on appeal by the circuit court, October Term, 1870, and the case is now (January, 1872) pending at Washington.

AUGUSTUS HOFFMAN & AL. v. RICHARD H. YARRINGTON.

OCTOBER, 1867.

Where an American vessel has been condemned in a foreign port as unfit for service, and sold, and it appears that the master has acted in good faith, and as a prudent owner would do if uninsured, and nothing more is shown, excepting that the ship had met with some rough weather and some injuries from perils of the seas: *Held*, the crew could not recover two months' extra wages; for they are within the proviso of § 26 of the act of 18 Aug. 1856, 11 Stats. 62, denying extra wages when a ship is condemned as unfit for service.

Nor in such a case can the crew recover the expense of their return to the United States.

How far the act of 1856 is inconsistent with §§ 12-15 of the act of 20 July, 1840, 5 Stats. 396, which gives extra wages when inspectors find a ship to have been sent to sea unsuitably provided in any important or essential particular, *quare?*

Whether the court could try the questions of which inspectors and consuls are made the judges by the act of 1840, §§ 12-15, *quare?*

Where the master in settling with the crew paid each man thirty-seven dollars too little, by mistake, but afterwards, before suit brought, refused to correct the error, the crew, though the extra wages demanded by them were found

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LIBEL by the seamen of the brig *Marshall* for wages. The voyage was from Boston to the west coast of Africa, and the master intended to trade up and down the coast until the outward cargo of rum and tobacco should be bartered for palm oil and other products of the country to load the ship for home. The brig met with heavy weather on the passage out, and after being on the coast for some months lost an anchor and damaged her windlass, so that the master thought best to go to Lagos, about three hundred miles to the leeward of the place where this misfortune was encountered, for repairs. Arriving at that port, she was not repaired, but was condemned and sold. The master acted in good faith, and with a view to the best interests of the owners, although at a loss to them and him. The vessel was unseaworthy and unfit to keep the seas, and how far this result was due to decay and ordinary wear and tear, and how far to the perils of this voyage, were points in controversy, but not very fully explained by the testimony. The libellants were paid what the master computed to be their full wages to the time of the sale of the brig, and their expenses to the nearest consular port, and they now claimed two months' extra wages, as for a sale of the vessel abroad; or their expenses home, as well as an alleged balance remaining unpaid of their wages at Lagos.

C. G. Thomas, for the libellants. This is a case for the payment of the two months' wages provided by the act of Feb. 28, 1803, § 9, 2 Stats. 203: *The Dawn*, Ware, 485; *Pool v. Welsh*, Gilpin, 193. Or, if not, then for the necessary expenses of the passage home: *The Dawn* (second opinion), Daveis, 121. Even a forced sale is within the statute.

T. H. Russell, for the respondent. We rely on the cases cited on the other side as showing that where there is in fact a sale by necessity, the statute does not require two months' wages to be paid beyond the amount actually due by the articles.

LOWELL, J. The cases cited in argument decide that the statute of 1803, § 9, refers to voluntary sales; and that all sales will be treated as voluntary which are made from a mere consideration of the preponderance of advantage to the owners, without an overruling necessity. Judge Ware says that if the ship could be repaired within a reasonable time and at a reasonable expense,

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the seamen have a right to demand the extra wages, if the master, for reasons of his own, fails to repair ; citing the case in *Gilpin* ; and that the burden of proving necessity is on the owners. In *Wells v. Meldrun*, Blatchf. & H. 342, Judge Betts decided that when a vessel was condemned and sold in a foreign port for unseaworthiness caused by natural decay and not by a casualty, it was such a sale as the statute contemplated, and the two months' pay could be recovered.

The evidence of an overruling necessity in this case is not very strong, and if the law of those decisions governed this, I ought perhaps to decree the two months' pay ; but it seems to me that the proviso of § 26 of the act of 18 August, 1856, 11 Stats. 62, passed long after those decisions were made, must be my guide. It provides, "That in case of wrecked or stranded ships or vessels, or ships or vessels condemned as unfit for service, no payment of extra wages shall be required ;" thus distinctly recognizing the very state of affairs which has occurred here. The language seems to include all vessels condemned as unfit for service, whether their unfitness has arisen from wreck or stranding or any other cause. Without saying that it would apply when a vessel has been sent to sea in such a condition that the owners ought to have known she was unfit, or even to a case where there has been no extraordinary peril, as to which I shall speak more at large hereafter, I hold that this statute denies the extra wages when the facts merely are that a vessel needing repairs from a sea peril has been condemned, and the master has acted in good faith, and his conduct has been such as a prudent owner would have adopted in like circumstances had he been uninsured, which is shown to be true of this sale.

It has been strenuously urged that the libellants are, at all events, entitled to the expenses of their return home, as decided by Judge Ware in his second opinion in *The Dawn*, *Daveis*, 121. Upon the rehearing of that case, it appeared that the vessel had met with such injuries as to be a wreck, and the decision was that the statute of 1803 did not cover such a case, and that by the maritime law the crew were entitled to receive out of the property a salvage compensation equal to the cost of their passage home, which was estimated at one month's wages. It would, perhaps,

have been quite as consistent with the facts of the case to rest the decision upon the ground that on a forced breaking up of the voyage, by overruling necessity, without an actual total loss of the vessel, the crew are to have their passage home provided at the expense of the ship; for there was no evidence of any salvage service performed by the crew, or by any one, or of any thing resembling salvage in the case. But here again the statute of 1856, by taking away the two months' wages, deprives the crew of all damages, because those wages were given instead of damages, and fixed an arbitrary standard which might, as in the case of *The Dawn*, have been more than the expenses of return, but which in long voyages might be less. Judge Peters used to allow one month's pay for a voyage broken up in the West Indies, two months if in Europe, and three months if in India: *Hindman v. Shaw*, 2 Pet. Adm. 264.

By the general maritime law the owners of a ship have a right to break up the voyage; that is to say, the crew have no power to enforce a specific performance of the contract, but they have a right to damages, depending upon the circumstances of each case: *Curtis on Merchant Seamen*, 296 *et seq.* and cases; *The Elizabeth*, 2 Dods. 403; *The Atalanta*, Bee, 48.

As early as the year 1792 congress regulated this matter, and declared that if an American vessel should be sold in a foreign port, the master, unless the crew were liable by their contract, or consented to be discharged there, should send them back to the State where they entered on board, and should furnish them with means sufficient for their return, to be ascertained by the consul at the port: 1 Stats. 256, § 8. This was repealed by the act of 1803, § 5, 2 Stats. 203, which established the unvarying rule, which is still the general rule, of three months' pay (two for the men and one for the United States) whenever a vessel is sold abroad and her crew discharged, or when a seaman is discharged abroad with his own consent. By the act of 20 July, 1840, §§ 12-15, 5 Stats. 396, upon complaint in writing of an officer and a majority of the crew that a vessel is unfit to go to sea, because she is leaky, or insufficiently supplied or manned, the consul may appoint inspectors to examine into the causes of complaint and report thereon to the consul; and they shall further report

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whether the vessel was sent to sea unsuitably provided in any important or essential particular by neglect or design, or through mistake or accident; and if either of the former, the consul, if he approves the report, is to discharge such of the crew as require it, each of whom shall be entitled to three months' pay besides the wages due him; but if the defects resulted from mistake or accident, and could not in the exercise of ordinary care have been known and provided against, then if the master shall in a reasonable time remove the causes of complaint, the crew shall remain and discharge their duty; otherwise they shall be discharged with one month's additional pay. Then comes the act of 18 August, 1856, § 26, 11 Stats. 62, with the proviso before cited concerning vessels condemned as unfit for service. This statute at § 33 expressly repeals certain parts of the act of 1840, but not sections 12-15, unless by the general repeal of acts and parts of acts inconsistent. How far they are inconsistent as applied to a vessel condemned and sold for defects in her hull or spars is not perfectly clear. It may be said that if the crew apply and obtain a report that the vessel was unfit for sea when she left the United States, they should be entitled to three months' or one month's pay, as the case may be, although the vessel should be condemned as unfit for service; and that the proviso of the later law applies only to cases where some casualty has caused, or at least contributed, to the unfitness. On the other hand, the argument may be that the act of 1840 is intended only for cases where some ordinary and proper equipment has been neglected, as of tackle, boats, provisions, &c., and not to the wearing out of a ship, which may be foreseen as likely to happen, but the precise time of which cannot be foreseen. I will not express an opinion upon this point, because in this case there was not only no inspection, nor a request for one, but neither party has cited or relied on either of these statutes, and the evidence has not been addressed to the issues either of law or fact which would arise under them. The case falls within the terms of the proviso, and it would be for the crew to show, that it was an exceptional case, properly calling for action under the act of 1840. Whether the court could exercise the duties of inspectors and consul in such a case as this, if the vessel had been condemned at a port where there was no consul, may likewise be reserved for consideration when it shall arise.

The Caroline.

The master made a mistake in his computation, and owes each of the libellants thirty-three dollars, and I shall give them costs, because the error was pointed out to him and he refused to correct it.

Decree accordingly.

THE CAROLINE.

OCTOBER, 1867.

It is no good defence to a petition that freight may be brought into the admiralty court to answer the exigency of suits for mariners' wages and materials which are a charge on the freight, that the consignee, before the libels were filed, was summoned as trustee or garnishee of the ship-owner in a court of common law.

The courts of common law of Massachusetts have no power to adjust maritime liens upon a fund attached under the foreign attachment law of that State, and the consequence of giving priority to such an attachment might be the destruction of the liens. The court of common law would be bound to guard against this consequence by discharging the supposed trustee, or by waiting till the liens were adjusted; and this court may proceed to adjust them, and may order the freight to be brought in for that purpose.

Such a course involves no conflict of jurisdiction, and is not inconsistent with the decisions in *Taylor v. Carryl*, 20 How. 583, and *Freeman v. Howe*, 24 How. 450.

THREE libels were brought against the brig Caroline and her freight, one for wages and two for supplies and materials, and the value of the vessel was shown to be insufficient. The Boston Gas Light Company, owners and consignees of the cargo, being required to show cause, under the 38th admiralty rule of the supreme court, why the freight should not be brought in to answer the exigency of the suit, appeared under protest, and showed that they had been summoned as trustees of the ship-owner, in the superior court of the Commonwealth before the filing of the libels.

C. T. Russell, for the freighters. This court has no jurisdiction to make the order prayed for, because the money is already in the custody of a court of the State. By Gen. Sts. of Mass. ch. 142, § 21, this process is an attachment, which brings the case within the decisions of *Taylor v. Carryl*, 20 How. 583, and *Freeman v. Howe*, 24 How. 450.

H. W. Muzzey & R. R. Bishop, for the several libellants.

LOWELL, J. The decision in *Taylor v. Carryl*, as explained in *Freeman v. Howe*, and in *Buck v. Colbath*, 3 Wallace, 334, does not

The Caroline.

operate to defeat the paramount maritime liens, but only to delay their enforcement, because the sheriff can sell only the right of the ship-owner, subject to those liens ; the practical effect of which I find to be that the sheriff usually waives his possession when libels are filed for maritime liens, because his title becomes of little or no market value. So that we have come back pretty much to the practice which prevailed before the leading case was decided. If that doctrine applies to an attachment of credits, its application in any given case may have the effect to destroy the maritime liens, because after the money has once been paid over by the freighter on due process of law, the remedy of the lien-holders will be very difficult of enforcement, to say the least. Judge Blatchford has refused to extend the rule to such a case as this ; and has stated very forcibly the hardship which would follow such an application of it: *The Sailor Prince*.¹

I have come to a like conclusion upon a consideration of the nature and effect of our foreign attachment law.

By that law it is, indeed, enacted that the credits shall be considered attached, and be held to respond the final judgment in the same manner as goods or estate when attached by the ordinary process. But in point of fact there is no possession taken by the sheriff, but merely an order served on the trustee to show cause why the judgment, when recovered, should not be satisfied out of the credits of the judgment debtor in his hands. If he answers that the credits are not due to the principal defendant, but to some one else, he must be discharged. And if he pays over to the adverse holder in the mean time, he is not in contempt, but is merely paying at his own risk, and the sheriff has nothing whatever to do about it. It follows that the fund is not really in the custody of the court, or of its officers, and that our trustee process is very different in this respect from the foreign attachment of the ship in the principal case, which was what we call in Massachusetts by the mere name of attachment. Our process does not undertake to impair obligations already existing, and if it appears that there are such obligations sufficient to exhaust the whole fund, the trustee must be discharged. True, there is a provision

¹ 1 Bened. 234.

The Caroline.

for permitting claimants of the fund to appear, but this is only for the purpose of protecting the trustee; there is no power to adjust and liquidate the adverse claims, and no process for their payment, but merely a course of proceeding which may bar the adverse claimant thereafter in any suit by him against the trustee, if his claim should be disallowed. It may be maintained with much plausibility that a credit which is incumbered is not liable to attachment. The general doctrine, in Massachusetts, is that incumbered goods cannot be attached: *Badlam v. Tucker*, 1 Pick. 399. This rule has been modified by statute, but in a mode which carefully preserves the rights of the holder of any mortgage pledge or lien, and requires payment to be made to him within ten days after notice. Gen Sts. ch. 123, §§ 62 *et seq.* There are no analogous provisions for credits that are pledged or incumbered; and it seems to me that it would be the duty of the court of common law, on proof that a fund was so incumbered, to discharge the trustee. In the case at bar, if the gas company answers to the trustee process, as it is bound to do on notice, that the fund in its possession is not due to the owners but to the master, who has a lien on it for wages and disbursements, the trustee must be discharged, for the master in such a case is like a factor who has made advances on the goods consigned to him, and has a right to collect the price of them: *Lewis v. Hancock*, 11 Mass. 72; *Richardson v. Whiting*, 18 Pick. 530; *Manter v. Holmes*, 10 Met. 402. And it can make no difference that the master is passive and the persons applying to the court are the sailors themselves, and others through whom the master derives his lien. If it should appear that the amount of the liens on the fund were not sufficient to absorb it entirely, the court of common law would perhaps have the right, if the statute under which the process is brought can be construed to extend to such a case, to charge the trustees to the extent of the surplus, but even that could not be done until the only court that has original jurisdiction of these maritime liens can adjust and liquidate them, so as to ascertain whether any thing will remain liable to the attachment, and this cannot lawfully be done by the court of admiralty until the fund is before it. So that unless the order now prayed for can be passed, each court must forever await the action of the other. The court of admi-

The Brig America.

ralty, on the other hand, can adjust and marshal all the liens, including that by the attachment, and can order any surplus to be paid into the superior court, or to be held to abide its action.

Upon the question of a supposed conflict of jurisdiction, an important case in England is very much in point, where to a suit by ship-owner against freighter, for the freight money, it was held by three courts, including the highest, to be a good plea in bar, that, since action brought, the freighter had been required to pay the money into the court of admiralty, and had paid it accordingly: *Place v. Potts*, 8 Exch. 705, 10 Exch. 370, 5 H. of L. Cases, 383.

Ordered that the freight money be brought in.

THE BRIG AMERICA.

OCTOBER, 1867.

The admiralty has jurisdiction to enforce a lien against a vessel given by a State statute in certain cases to a pilot whose services have been tendered and refused. The twelfth admiralty rule prescribed by the supreme court, which, as amended, prohibits the district courts from enforcing certain liens created by State statutes, has no application to pilots; for they come under the fourteenth rule.

LOWELL, J. The libellant, William R. Lampee, is a branch pilot, duly commissioned and qualified for the port and harbor of Boston. He spoke the brig America outside the line prescribed for that purpose, and offered his services to pilot her in, and was the first pilot that offered; but the master refused to employ him. The brig was inward bound, and was of a size and class presumed by law to require such services. Under these circumstances the vessel is bound, by the laws of Massachusetts, to pay the usual pilotage fee; and the same law gives a lien on the vessel and her appurtenances, for the space of sixty days, "for all legal claims on account of pilotage, either rendered or offered:" Stat. 1862, ch. 176, schedule, clauses 4, 5, 10. All this is admitted, but the claimants insist that this court has not jurisdiction to enforce the lien.

The Brig America

The States have power to regulate pilotage, in the absence of legislation by congress; and a regulation which gives to a duly qualified pilot a fee for services offered and refused is reasonable, and in accordance with the policy and practice of many commercial countries: *Cooley v. Port Wardens of Phila.*, 12 How. 299. A law substantially similar has been in force in this commonwealth from a period earlier than the adoption of the Constitution of the United States, and has been often construed and upheld by the courts. It does not impose a penalty, but implies a debt which may be recovered by an action of contract: *Commonwealth v. Ricketson*, 5 Met. 412; *Hunt v. Mickey*, 12 Met. 346; *Winslow v. Prince*, 6 Cush. 368; *Hunt v. Carlisle*, 1 Gray, 257. By the Revised Statutes of Massachusetts of 1836 (ch. 32, § 12), the master only was liable to make this payment; but by the regulations of the commissioners, under authority and having the force of law, the responsibility of the owner was added: *Hunt v. Mickey*, *supra*. In this state of the law Judge Sprague decided that the statute did not contemplate a lien on the vessel, but a mere personal debt, and that he could not supply the defect: *The Robert J. Mercer*, 1 Sprague, 284. The law has now been changed, and it is highly probable that the change was suggested by this decision. The liability is now attached to the vessel, in terms, without mention of either owner or master. No doubt this language may well be taken to imply a liability of both master and owner; but it certainly is intended to hold the vessel, for it proceeds to give a lien in the words already cited. This brings the case directly within the fourteenth admiralty rule: "In all suits for pilotage, the libellant may proceed against the ship and master, or against the ship, or against the owner alone, or the master alone, *in personam*." This is a suit for pilotage, that is, for a pilot's fee; not indeed for services actually rendered in piloting a vessel, but for an offer which the law makes the equivalent of such actual service. If the justice of the case required it, the libellant might be permitted to allege that he had piloted the vessel; but it does not, for the contract to pay the pilotage is complete, and conclusively presumed by law from the demand and refusal. If this court has not jurisdiction, the lien cannot be enforced; because the State law provides no process *in rem*, but leaves the pilot to the remedy

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which Judge Sprague would have granted, as he says, if the statute then before him had been like the law now in force. And even if the State statute had undertaken to give a remedy, it is very doubtful whether it could have been availed of against this foreign vessel consistently with the Constitution of the United States: *The Moses Taylor*, 4 Wallace, 411.

The cases, *People's Ferry Co. v. Beers*, 20 How. 393; *Maguire v. Card*, 21 How. 248; *Roach v. Chapman*, 22 How. 132, are cited as authority for the position that this court can never enforce a lien given by a State statute. But these cases, and others like them, have been fully and carefully explained as announcing only a rule of practice in the matter of repairs and supplies to domestic vessels, and not a general principle of jurisdiction; and, accordingly, a libel brought to enforce such a lien was upheld after the twelfth admiralty rule had been changed, on the ground that the libel was filed before that time. Of course that decision settles the right of a State to create a maritime lien, and of the admiralty court to enforce it, in proper cases; and vindicates the uniform action of the district courts from the foundation of the government: *The St. Lawrence*, 1 Black, 522. Whether the supreme court under its power to make rules, can lawfully oust the jurisdiction of the district courts in a case which is confessedly maritime, does not appear to have been very much considered by the court, and might be worthy of argument here after.

Again: it has never been decided that, in the case of a contract which by the general maritime law would give rise to a lien, the remedy in admiralty would be taken away by the mere fact, that the duration and extent of the lien may have been lawfully regulated by State legislation. Such is the present case. The general maritime law, recognized in the fourteenth admiralty rule, gives pilots a lien on the ship; the State has the right to regulate the subject-matter, and declares that a pilotage contract is complete when a due demand has been made and rejected: can there be a doubt that the pilot thereupon has a lien upon the ship, by the general maritime law, to enforce this valid contract? If so, he surely does not lose it, because the State tries to help him to it. If he does, then he must equally lose his lien for pilotage.

United States v. Morton.

actually performed ; for they stand on the same foundation, and are given by the same clause of the statute.

My opinion therefore is, that, as this case comes within the fourteenth rule, and not the twelfth, this court has jurisdiction to enforce a State lien ; and if this were not so, that a lien is implied or results from a valid contract for pilotage, unless, as in the case before Judge Sprague, the law expressly or by implication denies it. Taken either way, there is a lien which gives the right to proceed here against the vessel.

J. B. Richardson, for the libellant.

T. K. Lothrop, for the claimant.

UNITED STATES v. DAVID H. MORTON.

Under Statute of 8 March, 1855, § 1, 10 Stats. 715, a mate who is appointed master at a foreign port, and leaves the port with intent to bring certain passengers to the United States, and does bring them, in excess of the number permitted by that statute, is liable to the fine imposed on masters, though the agreement with the passengers had been made by the former master, if the defendant had knowledge of the facts, and opportunity to annul the illegal contract before leaving the foreign port.

INDICTMENT under § 1 of the act of 3d March, 1855, 10 Stats. 715. The case was, that the defendant was duly appointed master of an American vessel, in a port of the West Indies, on the death of the former master, and brought thence to the port of Boston certain passengers in excess of one to every two tons of the vessel. The evidence tended to show that the former master had made some oral agreement with the passengers, and that they were perhaps on board before the defendant's appointment. The judge ruled, that the defendant was not bound by the illegal agreement of the former master ; but if he knew the number of passengers on board and had time and opportunity to correct the mistake or fault of his predecessor, and failed to do so, and left the port with intent to bring the passengers to the United States, and carried out that intent, he was liable.

J. F. Pickering, for the defendant, moved for a new trial, on

The Gem.

the ground that the defendant did not take the passengers on board, within the meaning of the law.

H. D. Hyde, assistant district attorney, for the United States.

LOWELL, J. I am satisfied with the rule laid down at the trial. A construction of the statute which should hold the master responsible only for contracts made by him personally would annul it. In many cases, perhaps in most, the contract is made with the consignee or agent of the ship, and the passengers may come on board without the master's previous knowledge or assent. The statute requires him to see that its provisions are respected; and it must be held, that his permitting such passengers to remain on board is a taking on board. The mere physical fact of coming to the ship is not the material thing. They might come in one capacity as stevedores, &c., and remain in another. The phrase is used to explain the intent, as being something within the master's control, and to distinguish those cases where he has been deceived or misled without fault of his own.

The defendant being new to the office, and perhaps ill-informed of the law, no imprisonment is asked for; but the fine, which is a fixed sum, must be imposed.

Motion denied.

THE GEM.

DECEMBER, 1867.

Whether shipping articles which describe the voyage to be from the port of Salem, Mass., to Goree and a market and back to a final port of discharge in the United States, are sufficiently definite in the absence of evidence of usage to put some further limit to the voyage, *quære*?

How far usage could be invoked in aid of shipping articles, *quære*?

If such articles are valid, it must be by confining the voyage to Goree and neighboring ports, or ports usually visited in the same trade.

Limiting it thus, and holding the articles to be valid, they refer only to a market for selling the outward and procuring a homeward cargo, and do not authorize an intermediate trading voyage among the islands and on the coast of Africa.

When a seaman, shipped under such articles, has served until the outward cargo is disposed of, and a new intermediate trading voyage has been undertaken, and has well-grounded apprehensions of danger to his health, he may leave the vessel

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at a port where a substitute can be procured, without forfeiting the wages already earned ; because there is a deviation, and one which, so far as he is concerned, is a substantial one.

LOWELL, J. Antonio Joseph brings his libel for wages against the bark ; and it is admitted that he shipped at Salem as ordinary seaman on a voyage to the coast of Africa, and was with the vessel for six months and twenty days ; that while well, he was faithful and obedient ; that he was ill for some three weeks ; and that he left the vessel at Brava, one of the Cape de Verd Islands. The questions at issue are, whether the wages agreed on were twenty dollars a month or twenty-five dollars ; whether his leaving the vessel was justifiable, and if not, what penalty he should suffer in reduction or loss of wages, partial or total.

This man, who says he is able to write, was shipped under a false name and signed with his mark, at the request, as he says, of the shipping master, and it seems that all or most of the crew were shipped by names that they never were known by since, and probably not before. Hence the confusion as to the rate of wages. The libellant says he appears as Smith on the shipping articles, while the owner shows another name as that which libellant is understood to have used. For whatever reason this mode of shipment was adopted, it is to be reprehended ; and if there were any doubt of this man's identity, and the doubt were caused by the action of the shipping master, I should hold the owner to the higher rate ; but the evidence is clear that the libellant could have had but twenty dollars, because that is the only price given to ordinary seamen by these articles, and the advance that he received of twenty-three dollars (not twenty-five as he was inclined to say) is explained by its including three dollars which he was to pay the shipping master.

Coming to the other point : it seems that the libellant was ill of a fever for a considerable time, and was nervous and dispirited ; that he was afraid to go back to the coast of Africa, where his illness had been contracted, and, the master having refused to discharge him, he left the vessel, with no intention of returning, and his place was filled by the shipment of another man. This is not such a desertion as would authorize me to forfeit all his wages. There is no evidence that any entry was made in the log-book,

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and no statute desertion is set up. It is a peculiar case, and one that might require careful scrutiny to see how far the act was reasonable, and to what extent the owners had suffered by it. But upon another ground, I am of opinion that the master could not hold the libellant to further service.

The voyage described in the articles is, "From the port of Salem, Mass., to Goree and a market, and back to a final port of discharge in the United States." The vessel went to Goree and several ports on the west coast of Africa, in what order does not appear, disposed of her outward cargo, took passengers to one of the Cape de Verd Islands, went to a second island for provisions, and was about to proceed to a third for a cargo of salt, with which to return again to the coast, and by trade or barter obtain a homeward cargo. At the second of these islands the libellant left the vessel.

Was there a sufficient description of the voyage in the articles, and if so, had there been a deviation? The articles must set out in clear terms the voyage or voyages to be undertaken, or the term or terms of time to be occupied; and if this statute requisition is not followed, the seamen may leave the vessel at any port where no special inconvenience will thereby be caused to the owners: *Wope v. Hemmenway*, 1 Sprague, 300; affirmed, *Snow v. Wope*, 2 Curtis, C. C. 301; *The Crusader*, Ware, 437. In construing the articles, we are aided by analagous cases in the law of insurance. From New York to Barbadoes and a market, and thence to New York, construed by the light of a usage of trade, was held to mean to any island in the *West Indies*, until a market was found for the outward cargo; though it was doubted whether this construction would be given to a policy in any other trade; *Maxwell v. Robinson*, 1 Johns. 333. In two cases in Massachusetts, the market was limited in terms to Jamaica in one, and to the West Indies in another: *Houston v. N. E. Ins. Co.*, 5 Pick. 89; *Deblois v. Ocean Ins. Co.*, 16 Pick. 303. If the general words, Goree and a market, are to be limited by construction, how, and to what extent, are they to be limited? Where shall the court find the limit? There was some slight evidence, but not enough to show a general course of trade, that voyages to the west coast of Africa are commonly voyages of trade and barter along the coast

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and among the islands; both coast and islands were visited in this case. I confess I find great difficulty in construing these articles, independently of usage, as describing a voyage or voyages as fully and clearly as the seamen are entitled to have them defined. What is to prevent the master's going to Europe if he find no market in Africa or the islands?

The analogy of policies of insurance ceases here, because there is no rule of law avoiding policies which do not describe the voyage with clearness. Underwriters are supposed to be able to take care of themselves; they make such contract as they please; and a policy would not be held void for uncertainty, excepting as any other contract might be, which the court found itself wholly unable to construe. I am not aware that such a case has ever passed into judgment; but there are many where shipping articles have been so avoided. Again, if underwriters enter into an insurance agreement of indefinite duration, it may be a rule of law that they intend to contract for a reasonable time; and a question of fact whether such reasonable time had elapsed before the loss. The seaman is under the special protection of the statute law, and the duty is placed distinctly and solely upon the other party to the contract to see that it is properly expressed; and a reasonable time is not a term of time within the statute. If, therefore, this contract, independently of usage, means that the ship may seek a market anywhere, it is void, as not fixing the scope of the voyage with sufficient accuracy; or if the market means a number of markets, not only for the disposal of the outward cargo, but for indefinite intermediate trading, even within definite limits of space, it would be void for not fixing the limits of time.

But granting that the limits of this voyage can be fairly made out, by a consideration of the nature of the cargo, or otherwise, so as to comprehend only what is known as an African voyage; and that the market means a port or ports for the disposal of the outward and the procurement of a homeward cargo; then it would be a deviation to go on an intermediate voyage, such as the ship was prosecuting in this case. Her cargo had been sold, and if she could make a distinct voyage to get another cargo for trade on the coast, I see not why she could not make any number of such voyages. The ports she was bound to were not on the way to any

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port which was, or could be, a market for outward or homeward cargo, but were visited for the express purpose of an independent trading transaction. This was a deviation; because, from the market, the voyage described in the articles is to a port of final discharge in the United States; and even if the market includes ports for receiving homeward cargo separate and distinct from the ports of delivery of the outward cargo, the voyage now being prosecuted was to neither. It was a substantial deviation, and a most material one; because the very objection of the libellant, whether well or ill founded, to a further prosecution of the enterprise was, that it would oblige him to return again to the coast of Africa, which, if the voyage described had been adhered to, would not have been the case.

I may sum up my views of this case by saying that, while the construction of all maritime contracts concerning voyages, and the obligations of the master in prosecuting them, are founded on the same general principles, the law is more stringent in relation to ships' articles than in any other case, and rests the burden of making a proper agreement upon only one party to it. On the other hand it may be a little less stringent in the matter of deviation. There may be deviations which would discharge underwriters or charge carriers, that would not relieve seamen from their engagement. Into this consideration, however, it is not necessary to enter, because the change here was an important and onerous one, in view of the libellant's state of health. Nor do I now consider when and how far usages of trade can be relied on to explain the shipping articles.

Decree for the libellant.

W. J. Forsaith, for the libellant.

G. Wheatland, for the claimant.

THE MONTICELLO.

DECEMBER, 1867.

There is a fog at night, within the meaning of the act of 29th April, 1864, requiring a horn to be sounded by sailing vessels, whenever the weather is so thick that the horn would be heard farther than the ordinary signal lights of the vessel could be clearly distinguished.

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Where a steamer was running at least eight knots an hour on a calm foggy night and came suddenly on a schooner a little on the starboard bow, *held*, on the opinion of experts, that the steamer should have starboarded her helm, and having had time to do so was in fault for porting, and the damages were decreed to be divided, though the schooner was in fault for not sounding a fog-horn.

There is no objection to one party in a collision cause calling as witnesses persons who were on board the vessel of the other party.

COLLISION. — Libel for damage caused the schooner *Phoebe* by the steamer *Monticello*, on the the night of March 11, 1867, about twenty-six miles to the southward and eastward of Cape Lookout. The witnesses for the libellants deposed that they saw the mast-head and starboard side-lights of the steamer at a few minutes after ten o'clock, at a distance which they estimated at a mile, and about two points forward of their port beam. The crew of the schooner hailed the steamer, but she kept her course until close to the schooner, when an order was heard to port the helm, but they observed no change of course, and the claimants' steamer struck the schooner near the port fore-rigging and cut her down. The crew were saved by the steamer.

It appeared that the schooner was close-hauled on the port tack, with a wind that barely gave her steerage way. The steamer was bound down the coast in a south-westerly direction, and was running at least eight knots, with one lookout near the bows. The lookout saw the red light of the schooner very near him and a little on his starboard bow, and reported to the mate on the bridge, who gave the order to port, which was obeyed, and the schooner had swung off to starboard one and a half or two points before she struck the *Phoebe*. Concerning the amount of haze or fog the evidence was conflicting.

C. T. & T. H. Russell, for the libellants. The steamer was going too fast. The place was a thoroughfare for ships and vessels of all kinds, and eight miles an hour was excessive speed: *The Bay State*, 18 How. 89; *The St. Charles*, 19 How. 108. There should have been a lookout on each bow on a vessel of this size.

When the schooner was discovered the wrong order was given.

J. C. Dodge, for the claimants. The fault lies entirely with the schooner for not sounding a fog-horn. When we came sud-

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denly upon her we did right, or if not, it was so late that we should be excused, the first fault having been on the other side.

LOWELL, J. I am fully satisfied that whatever may be the truth in relation to the other matters, the steamer was in fault in porting her helm. The experts on both sides agree that the order should have been to starboard. It is said to be a general rule of navigation that when the vessel which is bound to give way sees a light close at hand on the port bow or directly ahead the helm should be put to port, but if on the starboard bow, the helm should be starboarded. Whether this be a general rule or not, it is manifestly a true rule for a case like this, where the red light of a sailing vessel is seen in a calm by a steamer going at least eight knots, because to clear her bows the steamer will require but a slight change, comparatively of only one point, as the experts say, to clear the steamer on that side, while it required three points on the other, the speed of the schooner counting for very little under the circumstances. I am fully satisfied, from all the evidence, that the steamer would have avoided the hull and probably even the head-gear of the *Phoebe*, if the mate had not unfortunately given the order to port, and insisted upon it, when some one, who, for aught he knew, he says, was the master, cried out to starboard. Nor can I find that the emergency was so sudden and extreme as to excuse such a mistake. The order to port which was heard on board the schooner was evidently the second order, which the mate says he gave very peremptorily when he heard some one crying to starboard, and it did not even then appear to the master of the schooner too late, if only the proper command had been given. From a consideration of what passed on board both vessels, and of the change of course which actually took place, I am convinced that there was ample time for this steamer, which was a quick steering vessel, to get out of the way, after seeing the schooner's signal.

It is said on behalf of the steamer, as showing fault on the other side, that the night was very thick and foggy, so that the lights of the schooner could be seen for only a few hundred feet, and that the schooner should have sounded a fog-horn, as required by the statute of April 29, 1864, 13 St. 60, ch. 69, art. 10, which enacts that whenever there is a fog, the fog signals shall be carried and used.

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The libellants contend that there was no such fog as is here referred to. They admit a haze, mist, or smoke, as it is variously termed by their witnesses, but say that the ordinary lights of a vessel could be seen a mile off. The claimants' witnesses represent a very much denser fog than this, and think a few hundred feet are the extent of the range of such lights at that time.

What is a fog such as the statute intends? Is it every haze, by day or night, of whatever density? To give the statute a reasonable interpretation we must suppose that its intent is to give to approaching vessels a warning which the fog would otherwise deprive them of. By day there must be fog enough to shut out the view of the sails or hull, or by night of the lights, within the range of the horn, whistle, or bell. It means that a safeguard of practical utility under the circumstances, should be provided. If it be entirely plain, upon the evidence, that the ordinary signals are sufficient and more efficacious than the horn could be, the horn will not be required. But a serious doubt upon this point must weigh against the vessel failing to comply with the statute, I do not consider it to be enough to aver and prove that the lights might be seen in time to avoid serious danger; but where it is evident that the fog signal could not have been so useful as the ordinary signal, it need not be used. Thus if the lights could be plainly and easily made out at a mile, and the fog-horn could not be heard at a third or a quarter of that distance, I cannot suppose that such a state of the atmosphere would amount to a fog in the sense of the law. It is to guard against some danger which the fog would or might cause, and from which the horn might possibly guard, that it is to be blown.

Before considering the state of the weather, I may dispose of one defence set up by the schooner, that her hail was equivalent to the horn. The evidence does not satisfy me that the fact is so, and it would require very strong evidence to outweigh the expressed legislative opinion that the other signal is the better.

Coming to the question of fact, it is found that the schooner's men, with a rather suspicious unanimity, give it as their opinion that a vessel's lights could be seen a mile off; and that they did see the steamer's lights at that distance. The estimates which sailors make of time and distance on such occasions are notoriously

untrustworthy, not so much from any wilful misstatement, as from the great difficulty of arriving at satisfactory conclusions in their own minds, as well as an inability to express their precise meaning. The same witness will often give these measurements differently in different parts of his evidence. Looking carefully at what they did on board the schooner, I am unable to account for the six or seven minutes which would elapse before the steamer could make a mile. They began to shout very soon after they saw the other vessel, and yet two of the men who were roused by the shouts had not reached the deck when the vessels came together. They think they shouted for a considerable time, but they were not heard on board the steamer until about the time the light was seen, and then they were heard without difficulty on that calm night, and the steamer's second order to port was heard by them. On a clear night the steamer's mast-head light ought to be visible at a distance of at least five miles, if she had the regulation lights, as it is proved she had ; but it appears to have broken upon the schooner's crew suddenly, three of them seeing it at once, and one likening it to a star, at the distance which they now estimate at a mile. I think that estimate may probably be influenced by the suspense and anxiety which made the time seem very long before their hail was observed. It is a very delicate and difficult task to decide such a question as this upon written testimony ; and I have endeavored to bring it to the test of the various circumstances given in evidence. One of these, appealed to on both sides, is the distance at which the lights of the steamer were actually seen, after the collision, by the men on the wreck ; but I have not been able to satisfy myself what that distance was. I can only say that I do not think it is proved to have been any thing like a mile.

There are three witnesses who stand in a peculiar relation to the case. They are steamer's men, called and examined on behalf of the schooner. The fact that they are used on that side has been severely commented upon, and some remarks of Dr. Lushington were read, in which that learned judge disparages affidavits taken from the hostile camp, as he expresses it. Any thing like tampering with witnesses would deserve and would receive the sternest reprehension of the court, but the case shows nothing of that

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sort ; and it is to be remembered that we are not presented with *ex parte* affidavits, as in the case cited, but with full examination and cross-examination which develop the history of their engagement as witnesses and show nothing improper. These three witnesses give their evidence with moderation and with no obvious bias, and I am disposed to rely a good deal upon their statement of the weather. They all say that it was foggy. In their estimates of how far the running lights of a vessel could be seen they differ, and had evidently not concerted their answers ; one says two hundred and fifty yards ; one, twice the steamer's length, which would be some thing over two hundred yards ; the third gives two estimates, the largest of which is a quarter of a mile. The best judgment I have been able to form upon all the evidence is, that there was a fog, which, though not as dense as many others, was enough so to render the sounding of the fog-horn a proper precaution. Upon the evidence, such a signal might probably, on a calm night like this, have been heard on board the steamer at the distance of half a mile, and I am not satisfied that with ordinary vigilance the schooner's lights would have been clearly distinguishable at that distance. This opinion is founded upon the direct statements of the steamer's crew, but especially of those three whom the libellants called ; and upon the facts that the lights of neither vessel were seen at any considerable distance from the other, that the fog was a sea fog from the north-east, and the other circumstances above referred to.

Both parties were in fault, and it is impossible to say that either fault was the sole cause of the collision.

Damages to be divided.

This decree was affirmed on appeal, October Term, 1870 ; and upon the question of fault in the steamer, the court added to the reasons given in the district court, that she had no right to go so fast in a fog as to be unable to stop or reverse, if necessary, within the time shown to have been at her command in this case.

Re Edward Hubbard, Jr.

Re EDWARD HUBBARD, Jr.

DECEMBER, 1867.

A creditor who has proved his debt in bankruptcy may be permitted to withdraw his proof if it was made under a mistake of fact or law.

Leave to withdraw will usually be granted where the withdrawal will restore all parties to the position they were in before the proof was made; but not if intervening rights will be affected.

BANKRUPTCY. — In this case certain creditors proved their debts at the first meeting, on the twenty-fifth of November, and on the twenty-first of December they filed a petition before the register to be allowed to withdraw their proofs of debt from the files, for the reason that, since proof had been made, they had discovered that a certain person named was a dormant partner with the bankrupt, and was solvent; that they could not by due diligence have discovered this fact earlier; and alleging that they had discontinued all suits against the bankrupt himself. The register certified to the judge the question whether the petition ought to be granted.

LOWELL, J. Where proof has been made under a mistake of fact, or even of law, it may be corrected, almost as a matter of course, if neither the bankrupt nor other creditors who have proved will be injured. And even where the rights of others will be affected, if the only effect is to restore all parties to the position they were in before the debt was proved, it would be proper to allow the withdrawal if there had been a mistake, and no want of diligence. In the only case in which I have refused such a petition, the creditor, by proving his debt, had relieved an attachment by trustee process, and the garnishee had in good faith paid over the funds to the assignee. Although I did not believe that any court would hold the lien to be revived by the creditor's withdrawing his proof, yet it was not right to permit such a question to be even mooted.

Under our practice an order of this kind may be passed by the register, if after due notice, no opposition is made; otherwise by the court.

The decisions on the question are, *Morse v. Lowell*, 7 Met. 152; *Ex parte Harwood*, Crabbe, 496; *Bemis v. Smith*, 10 Met. 194; *Safford v. Slade*, 11 Cush. 29; *Beverly Bank v. Wilkinson*, 2 Gray, 519.

Leave to withdraw proof granted.

Burke & al. v. Buttman & al. (The Ella Franklin).

BURKE v. BUTTMAN (THE ELLA FRANKLIN).

DECEMBER, 1867.

Shipping articles described the voyage to be from "Boston to Goree, Africa, at and from thence to such port or ports as the master might direct." *Held*, that though these articles were void, they would not authorize the master to discharge the men at any African port or ports in his discretion, but must be construed as against the owners to intend a voyage of which a port of discharge in the United States would be the final terminus.

The master in such a case could not oblige the men to ship in Africa on board another vessel belonging to the same owners, and for being forced to serve in such a vessel and being there kept on short allowance, the owners are responsible in damages.

Nor could he discharge them abroad, unless the vessel was condemned, or sold, or wrecked.

The seamen having been discharged in Africa against their will, were held entitled to wages until their return to the United States, and were not bound to come back as seamen in the vessel belonging to the same owners, in which they had already been illtreated.

WAGES. — These three libellants shipped as seamen on board the schooner *Ella Franklin* at Boston, on the third of November last. The voyage was alleged to be from Boston to the Cape de Verd Islands, one or more ports as the master might direct, and back to the United States, the voyage not to exceed six months. The articles described the voyage thus: from Boston to Goree, Africa, at and from thence to such port or ports as the master may direct, wages to be paid in United States currency or its equivalent at the current rate of exchange.

Parol evidence was admitted that the owners never intended that the schooner should return to the United States, and the shipping masters testified that they informed the seamen of this fact. The only libellant who was examined was equally positive that he was not informed of it, and there was evidence tending to show that the other libellants did not so understand the contract.

At the first port in the Cape de Verds, before the vessel had arrived at Goree, the master obliged two of the men to go on board the bark *Warren Hallett*, belonging to the same owners, and which was bound to the coast of Africa and thence home. The

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men never consented to this transfer, and never signed the articles of the bark, and upon the arrival of the vessel at Bathurst on the coast, some three weeks afterwards, they demanded to be sent back to the schooner which had accompanied the bark. The master not consenting to this course, and the consul finding that they were not legally bound to the bark, they were discharged against their will. The third man was discharged at Bathurst, directly from the schooner, but without his consent. It was agreed that all wages due up to that time, and three months' extra wages were paid to the consul; but this money was expended by the consul in paying their charges at Bathurst and their passage home to New York, where they arrived March 3, 1867.

The two men who were transferred to the bark refused to serve while on board of her from the Cape de Verds to Bathurst, which was a voyage of some days' duration, and were kept on bread and water as a punishment for that refusal. At Bathurst all three were offered places as seamen on board the bark, which was soon to come home, and which actually arrived at Boston in February, but they were not allowed to come as consul's men, and waited some weeks longer.

E. Merwin, for the libellants.

W. A. Field, for the respondents. The articles describe a voyage sufficiently as far as Goree, and if the seamen could leave the vessel there by reason of the indefinite manner in which the contract is expressed, the master had the corresponding right to discharge them there; and, having done so, they were entitled to nothing, not even to the three months' wages.

LOWELL, J. It is not necessary to decide whether the articles were wholly void, because the voyage was partly performed under them. It cannot for a moment be admitted that the master or owners can take advantage of a defect in the contract to terminate it at pleasure. The obligation is all on one side; it is the duty of master and owners to see that the voyage is fully and fairly described in writing, and no duty rests upon the seamen in regard to it. They have nothing to do with the matter. These articles must be construed most strongly against the owners, and they may fairly be held to mean that among the ports the master should direct was to be some home port. It cannot be left to a doubtful

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interpretation. If the master intended to discharge the sailors at one or more ports of Africa, he should have said so, clearly and explicitly, *in writing*. As it is, I must hold, and do so without the slightest difficulty, that the men had a right to come home in the vessel in which they went out, and that the master had no right to transfer them to another vessel with different officers, nor to discharge them on the coast unless the schooner was sold there, wrecked, or condemned, in which several cases the statutes provide for one month's or two months' wages, or more, according to circumstances. The right which he assumed to discharge, some at one port, some at another, and still others at a third, is not warranted by the articles. It is entirely clear that the libellants were unlawfully discharged and are entitled to their wages up to the time of their return to the United States, unless something is due by way of recoupment or deduction for wages which they might have earned in the mean time.

Upon this point the evidence is that they might have come home directly in the Warren Hallett, and have earned wages all the time. I admit the principle that owners have a right to require diligence even in seamen whom they have wrongfully discharged; and that idleness or a sullen refusal to be employed should not be allowed to swell the damages. But the answer of the libellants is in this respect satisfactory. Two of them had been improperly put on board the Warren Hallett, and had had a controversy with her master, in which the latter had been in the wrong and had been overruled by the consul. Under these circumstances the libellants might well be slow to take service with him again. It was too much to expect of human nature that he should not look with some prejudice, even though it might be unconsciously, upon their future conduct. I am of opinion, therefore, that the three libellants are entitled to four months' wages, at the rates mentioned in the shipping articles; and that the two who were obliged to go on board the Warren Hallett are entitled to damages for their treatment on board of her.

I ought to observe here, that the master of the Ella Franklin does not appear to have intended any wrong to these men, nor to have used any violence; perhaps he did not even threaten any. He was impressed with the idea, familiar to his own mind, that

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his schooner was not to return. He honestly thought, perhaps, that the very best thing for these sailors to do was to serve on board the bark, a better vessel than his own, more convenient and more seaworthy. He forgot that the sailors had a right to say, as they did say, We have made no such bargain; we choose to stick to you and your schooner.

Looking at the circumstances and the absence of all violence, abuse, and actual personal suffering, except in a spare diet, I shall give to each of these seamen two dollars a day for the time they were actually detained on board the bark.

It will be seen that my opinion does not turn upon the oral evidence at all. It was admitted, in favor of the seamen, because the circuit court has held that it is admissible for them. It was admitted for the owners merely in rebuttal. It is a dangerous sort of evidence, and one on which I am always reluctant to decide a case. It must not be supposed that if it were fully and clearly established by such evidence that the seamen were to be discharged in Africa, that the master would be entitled to discharge them there. The rule of evidence, like the contract itself, is established for the benefit of the ignorant and careless seaman, and for the seaman only. Masters and owners have ample protection in the contract itself, which if properly drawn up and clearly explained to the men will be conclusive. These articles do not fully and fairly warn the men of the rights which the master undertook to exercise. It is upon the articles that this case is decided.

E. Merwin, for the libellants.

Decree for the libellants.

W. A. Field, for the respondents.

THE WILLARD SAULSBURY.

JANUARY, 1868.

A boom was anchored within the limits of the "Narrows" in Boston harbor, as a protection to the scows and dredges at work in deepening and enlarging the channel. A tug was moored to the boom on the inside, at night, without displaying a light, and keeping no watch, and was run into and much injured by a schooner which was coming up the harbor with a proper lookout. The schooner's men had no actual notice of the boom, nor had any notice of its being placed there been

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made public. The course of the schooner was rather to the northerly side of the channel, and there was room to go to the middle or southward.

- Held*, 1. The tug should have displayed the light required by article seven of the sailing rules of the act of 1864, 18 Stats. 59, because she was anchored in a fair-way.
2. By the general maritime law the tug was bound, if the statute did not apply to her, to keep a watch and show a light.
3. The schooner, not having actual or constructive knowledge of the boom, and keeping a good lookout, had a right to go in any part of what had been, and was supposed still to be, the channel, as she pleased. On the facts concerning her diligence, she was not in fault.
4. *It seems*, that the court has jurisdiction of an action *in rem* against the schooner by one who was injured on board the tug.

COLLISION. — Libel by the owners and another by the master of the tug Ellen for injuries to the vessel and to the master in a collision with the schooner Willard Saulsbury.

At about midnight of the 24th–25th September, 1867, the tug was lying moored to a boom which was anchored in the “Narrows,” so called, in Boston harbor, to protect the dredging-machines which were at work widening the channel under authority of the United States. The schooner was sailing up the harbor, on the port tack, with the wind nearly abeam, and the tide about half ebb; the mate and one man were on the lookout forward, and the master was at the wheel. The mate discovered the tug directly ahead and gave proper orders; but it was too late, and the tug was damaged and her master sustained very serious injuries. The night was clear starlight; the tug was moored just inside the boom without a watch and without the light required by statute for vessels anchored in a roadstead or fair-way. There were bright lights near Lovell’s Island, where the dredging-machines were kept at work by night as well as by day; but whether these lights would tend to show the tug to persons coming up the Narrows, and whether the tug herself had any light at all, were disputed points.

J. C. Dodge, for the libellants. The schooner was in fault. The tug being at anchor, this is presumed; and the evidence shows that she might and ought to have been seen.

The tug was not in a roadstead or fair-way, because the boom had been laid down by authority, and, of course, the space within it had ceased to be a part of the fair-way.

H. A. Scudder, for the claimants. The tug should have had the light required for vessels at anchor in a fair-way.

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LOWELL, J. A roadstead is a place where vessels usually anchor; and a fair-way is where they usually pass and repass. That the Narrows are a fair-way which from the depth of water is resorted to by more than half of all the vessels that come to or leave Boston, notwithstanding its narrowness, cannot be disputed. Independently of the boom, the spot where the tug lay is a part of the fair-way. Taking the plan of Mr. Buckke, the engineer and contractor, to be correct, as it doubtless is, the width of the channel here between the low-water lines on either side, is about six hundred feet, and the tug lay about one hundred feet out from that line on the Lovell's Island side. The evidence on both sides shows that at all states of the tide vessels could, and often did, run inside of this spot. Some of the libellants' witnesses do say that the tug was inside of the ordinary track of vessels coming up or down the Narrows; but on full examination it appeared that they mean only that vessels would ordinarily try to keep near mid-channel if they could, and had room enough, and that most of them would probably succeed. Not that many might not go inside, but that most would not in fact do so. This has no tendency to show that this spot was not a part of the fair-way. A like argument would show the gutter to be no part of a street, because most carriages would keep nearer the middle if they conveniently could. It is in vain to say that this schooner, if she had made the straightest and best course from some point where she had been a few minutes before to some other point whither she was going, would not have passed over this spot; if it was a part of the thoroughfare through which vessels pass, it was within the statute.

The next point presents a different consideration. Mr. Buckke put down this boom to protect his dredging-machines, with the consent of the light-house board; and it is argued that thereby the water within the boom became of right and in fact separated from the fair-way, because the work being lawful, all necessary and proper aids and appliances are lawful; and that if this be so, the statute does not apply. This argument has much force in showing the lawfulness of the obstruction; but the consequence does not follow. The boom was moored in the fair-way, and if it had been a ship it should have been furnished with the statute

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signal ; this tug was moored to the boom and so near the fair-way as to be in danger of injury from vessels there navigating in ignorance of her presence, and under these circumstances I consider her to be at anchor in the fair-way within the intent and meaning of the statute. She made, for the time, a part of the boom which was so anchored.

Nor have I any doubt that if the statute does not apply to the case, the tug should have kept a watch or a sufficient light, or both, by the rules of the general maritime law, which rest the obligation upon the actual danger to be anticipated if the caution is neglected, rather than on the construction of any particular word. How are the facts ? The works here were conducted by day and night ; the tug was waiting for the scows to be loaded. It does not appear that any vessel had been accustomed to lie there, and it was not a place in which a vessel at anchor would be looked for. Within a few minutes of the collision two schooners and perhaps a bark had nearly run over the tug. The dredging operations had been going on but six or seven weeks, and many of the coasters, including this schooner, to say nothing of ships whose voyages are longer, had no notice of the boom. General Foster, commanding the district, and Judge Russell, collector of the port, had very properly published a notice in the newspapers warning mariners not to collide with the dredging-machines under pain of damage ; but the boom had not then been established, as I suppose, at all events, no notice was given of it ; but, on the contrary, the public were expressly informed that the machines would lie close to the bank. Under these circumstances, it was incumbent upon the tug to take every proper means to warn vessels of her presence. If a vessel is lying at a place where vessels usually lie, and out of the track where vessels usually pass, as, for instance, close to the bank of a wide river, like the Mississippi, such precautions are not usually required ; but if they lie at anchor in the track of vessels they must show a light: *The St. Charles*, 19 How. 108.

The libellants contend that, whether the tug should have shown the statute light or not, she had a light in her pilot-house, and that she might easily have been seen in time to avoid the collision ; all duty of avoiding being on the schooner, which was under way, and therefore that latter was in fault.

Upon this head, many of the facts above mentioned under other points, are of importance. The boom was recently laid down, the tug was not usually there, the published notice and the nature of the channel rendered it improbable that a tug would be anchored there; two vessels at about the same time barely avoided her by luffing. The schooner, as is usual in passing through this passage at night, had two lookouts, one of whom was an officer, and this doubling of the lookout was made for the very purpose of working the vessel carefully and promptly for a few minutes only, and may therefore be presumed to have been effective; the evidence shows that the lookouts were vigilant. Now these circumstances tend to show that no fault is to be found with the schooner. The main point of fact in controversy is, whether the tug had a light in her wheel-house. The three men on board of her say she had, and other persons on the shore say they saw it. Six witnesses from vessels passing within a few minutes besides those of the respondent schooner are called, one of them by the libellants, and not one of them saw any light. It is a sound canon of criticism on such evidence to believe the positive against the negative, and to believe the witnesses of each vessel concerning her state and conduct; but even with these, I can hardly believe that there was a light visible to ships coming up the Narrows. It is not very improbable that, for some reason or other, it was obscured at the time from the view of such vessels; this is the only theory that can reconcile the evidence. The case is not full or clear concerning the amount of light, excepting that it was sufficient to read the clock by, and that it was seen on shore. Upon the whole, I cannot allow this evidence to prevail so far as to show by inference that the schooner must have been in fault, when all the evidence shows that she was not. Whether it might not have been possible to see the tug sooner, I do not think very material; she was in a place where a vessel under way would have been likely to be going up the harbor, or if coming down should have had side lights, and where a vessel at anchor was not to be expected; for vessels do not anchor there excepting in case of necessity; she was a small vessel not easily made out; the numerous lights about her on the shore, more brilliant than her own, if she had one, might probably tend to withdraw attention from her rather

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than to aid in seeing her, as alleged in the libel, and three vessels with efficient lookouts failed to see her.

Upon the whole, I am satisfied that whether the tug was in fault or not, she has failed to show that the schooner was. The libels must be dismissed with costs.

I have no doubt that this court has jurisdiction of the case of Captain Taylor. It has been exercised in like cases in this district, and not denied anywhere so far as I know: *The Maverick*, 1 Sprague, 23.

Decree for the claimants.

An appeal was claimed from this decree, but was afterwards abandoned, the claimants agreeing to take no costs.

 CIRCUIT COURT.

UNITED STATES v. JOHN J. FOX & AL.

JANUARY, 1868.

In an indictment on § 23 of the act of July 13, 1866, 14 Stats. 153, for carrying on the business of a distiller of spirits, without paying the special tax, it is not necessary to set out the particular acts of distilling or the kinds of spirit.

"Then and there distilling and manufacturing spirits to a very large amount, to wit, to the amount and number of one thousand gallons of proof spirit," is a sufficient affirmative allegation that the defendant did distil.

Gallons of proof spirit in that connection means the same thing as the proof gallons of spirit mentioned in the statute, that is, the gallons, which if the liquor were of exact proof it would measure; and the evidence will not be confined to spirits which are actually of proof strength.

Such an indictment is not open to objection as multifarious if it charges in the same count that the defendants and each of them carried on the business.

Where the law substituting special taxes for licenses took effect upon distillers from and after September 1, 1866, and the charge was that the defendants carried on the business of distillers on the first of September, 1866, and thence to the tenth of December, 1866, without paying the special tax required by law, and under the former law licenses were issued for the business, to run from May to May, though for a smaller fee: *Quære*, Whether a person licensed under the old law, May 1, 1866, may not continue the business without further payment to May 1, 1867?

Held, such a person would not be indictable for continuing the business until due assessment of the additional fee, if any, had been made; and an indictment, which

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showed the business to have been begun under the old law and continued under the new, should negative the payment of the license fee, or of the additional fee, as well as of the special tax.

INDICTMENT against two persons, alleged that they carried on the business of a distiller on the first day of September, 1866, and on divers other days up to and until the tenth day of December of the same year, without having paid the special tax as required by law; they and each of them then and there distilling and manufacturing spirits to a very large amount, to wit, to the amount and number of one thousand gallons of proof spirit. After conviction they moved in arrest of judgment.

L. S. Dabney, for the defendants. 1. The indictment ought to charge the particular acts which go to show that the defendants were distillers, with time, place, &c.

2. Then and there distilling and manufacturing is argumentative.

3. Both counts are multifarious, because they charge that the defendants and each of them distilled, &c.

4. The evidence should have been strictly confined to the manufacture of spirit of precisely proof strength, because the only charge is of making such spirit.

5. There should be a charge, either that the defendants began business after the new law went into effect, or that they had paid no license fee under the old law, because the licenses were from May to May, and would protect the business for the first eight months after Sept. 1, 1866.

H. D. Hyde, assistant district attorney, for the United States. It is not necessary to negative the existence of a license, because, supposing one to have been granted, it would not protect this business after Sept. 1. Section 80 of the new act, 14 Stats. 122, provides that where any person has been assessed for a license before the passage of this act, and the amount so assessed is equal to the tax herein imposed for the business covered by such license, no special tax shall be assessed until the expiration of the period for which the license was assessed. This implies that where the tax is increased, as is the fact with distillers, the license does not protect.

Besides, the allegation of time is immaterial, and this objection, therefore, comes too late. After verdict we may presume that the

evidence proved the acts to have been done since May 1, 1867, the indictment having been found since that time.

LOWELL, J. As I had occasion to observe in another case, the precedents prescribe a very simple form of charging such a crime as this and of negating the authority or license. And in general, when the charge is, that a certain trade has been carried on, or that the defendant has sustained a particular character, as that of a barrator, scold, &c., it is not essential to set out the particular acts which go to make up the trading or course of life. It would be otherwise if each act were a crime; or if by the statute definition a fixed number of separate acts made up the crime. Under this law, the quantity of spirits distilled is important, because the minimum fine depends upon it; but not the kind of spirits, nor the separate acts of distilling. So as to the time. The acts being continuous, it is well to charge them as having been done on divers days between two certain days: *Commonwealth v. Tower*, 8 Met. 527; *Wells v. Commonwealth*, 12 Gray, 327, per Metcalf, J.

The objection to the expression "then and there distilling," &c., applies only to the first count; but it is not valid even to that; the legal intent of these words is, that the defendant did then and there distil: *Turns v. Commonwealth*, 6 Met. 224.

The charge that two persons and each of them carried on a business is well enough if they were partners or jointly concerned in the business: *Rex v. Dixon*, 10 Mod. 335. And this indictment clearly points to a joint trade. I do not decide that in a misdemeanor such an objection can ever be taken at this stage of the case.

It was urged with great apparent confidence, both at the trial and since, that the allegation of distilling one thousand gallons of proof spirit, confines the government to showing the manufacture of spirit at the exact strength of first proof, as established by another part of the statute, that is, one-half alcohol. I am of opinion, on the contrary, that this expression, "gallons of proof spirit," in the connection in which it is found, is not intended to be descriptive of the kind or strength of the spirit distilled, but only of the quantity, according to the statute standard. The mode of taxation, borrowed by congress from the excise laws of England, is to assess spirits by a conventional measure, depending

upon the amount of alcohol which they contain. This measure is expressed in gallons, though the precise number of gallons taxed does not exist, excepting when the spirit is of exactly proof strength. Thus, for the purposes of taxation, that quantity, be it more or less, which contains ten gallons of pure alcohol, is twenty gallons of proof spirits. This has been found to be a very fair and convenient method, and it has led to the use of the phrases, proof gallons, gallons of proof spirit, gallons of spirit at the strength of proof, all of which mean the estimated number of gallons contained in the liquors spoken of, whatever their actual bulk may be. This use of terms I find in Ure's Dictionary, Muspratt's Chemistry, and other works of like character. Our statute taxes the proof gallon, and it is easy to understand what that is, though I have not found any general dictionary of the language that defines any such gallon. This indictment sets out the number of such gallons, in order to enable the court to impose the proper fine.

The last objection appears to be well taken. The indictment ought to show that the business was carried on without due payment. Now every thing here alleged may be true, and yet the defendants may have paid a license fee on the first of May, 1866, and the business may have been conducted under the license. The new act went into operation on the second day of September, and it does require a larger fee to be paid by distillers than was required by the statute of 1864; but it may well be doubted whether the assessors would be authorized to assess the increased amount before the following May, upon those who had licenses under the old act. I find nothing in the new act looking to any such action, excepting the *proviso* of the eightieth section, cited at the bar, which prohibits a new assessment in certain cases; the implication from that proviso is hardly strong enough to warrant me in adding a positive duty not elsewhere enjoined. I am informed that the practice of assessors has not been uniform in the different districts in this particular; and I can easily understand that this might be so. But of this I am clear, that it cannot have been the intention of the law to render a distiller liable to these severe penalties who was carrying on his business under license when the new law took effect, unless he had been duly assessed and called on to pay the additional fee, and had refused or neglected to do so.

The Sarah Jane.

It is said that the time is immaterial, and that on this motion it may be presumed that evidence was given of acts done since May 1, 1867. It is not material to prove the time precisely as alleged, but it is necessary that the time charged should be consistent with the offence charged, so that the indictment shall be good on its face. Thus to lay an impossible time, or one beyond the statute of limitations; or that a crime which can only be committed on Sunday was done on Monday, &c., would be bad. In motions for arrest of judgment, the time is presumed to be truly alleged: *Commonwealth v. Hitchings*, 5 Gray, 485; and taking this to be so, this indictment shows that the statute had come into full operation only as to those distillers who began business afterwards, or who being assessed for an extra license fee had not paid it, and not as to all distillers; and these defendants should have been shown to be within its operation, by alleging either that they began the business under the new law, or that they were not licensed under the old law, or that having been so licensed and having been assessed an additional fee, they had not paid it.

Judgment arrested.

DISTRICT COURT.

THE SARAH JANE.

FEBRUARY, 1868.

The admiralty has jurisdiction of a libel by mariners for their wages against a vessel plying on navigable waters, though these waters are entirely within one State. Some cases on the subject of the jurisdiction in admiralty considered.

LOWELL, J. The libellants allege that they have served as mariners on board the sloop Sarah Jane, in voyages between Boston and Quincy. The jurisdiction of the court is called in question by the claimant, on the ground that the navigation was wholly within the internal waters of Massachusetts. In a case involving this question, and in which the present claimant was the libellant, Judge Sprague upheld the jurisdiction: *The Canton*, 1 Sprague, 437; and see *The May Queen*, 1 Sprague, 588. The question has been argued anew, especially with reference to the bearing of more

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recent adjudications ; and I have given it careful attention. I am well satisfied that the decisions above cited are right in principle, and shall only concern myself with the authorities.

Mr. Justice Story, in *De Lovio v. Boit*, 2 Gallison, 398, laid down the broad doctrine, that the grant of admiralty and maritime jurisdiction, in the constitution of the United States, was not to be limited by a regard to the bounds which the court of king's bench in England had succeeded in imposing upon the court of admiralty of that country. After the lapse of half a century, and after a contest scarcely less animated than that which the subject had excited in England some generations earlier, it has been established here that Judge Story was right. And even in England, parliament has found it convenient to restore to the admiralty the powers which a narrow construction of the statutes of Richard II. had taken away from that forum. In the United States, the jurisdiction in civil causes has been put upon the firm foundation that, in actions *ex delicto*, the place determines it, and in actions *ex contractu*, the subject-matter ; and the place is not merely the high seas, but wherever navigable water is found, whether within or without the body of a State or county : *Waring v. Clarke*, 5 How. 441 ; *New Jersey S. N. Co. v. Merchants' Bank*, 6 How. 344 ; *The Genesee Chief*, 12 How. 443 ; *Steamboat New World v. King*, 16 How. 469 ; *The Magnolia*, 20 How. 296 ; *Nelson v. Leland*, 22 How. 48.

The victory, indeed, has not been obtained without leaving some losses to be regretted. Upon the question, What is a maritime contract? the answer has not always been very liberal ; and the very contract under consideration in *De Lovio v. Boit*, that of insurance, is not yet universally recognized as being within the scope of the grant : *Gloucester Ins. Co. v. Younger*, 2 Curtis, 322. So Judge Sprague's argument, that a contract to build a ship is maritime, has been overruled, though it can hardly be said to have been answered : *The Richard Busteed*, 1 Sprague, 441 ; *Roach v. Chapman*, 22 How. 129. And there are, possibly, some doubts yet unresolved concerning general average and some other matters : *Cutler v. Rae*, 7 How. 729 ; *Dupont de Nemours v. Vance*, 19 How. 162.

It is upon one of these doubtful points that this case is argued. It has been intimated by some of the learned judges, when deliver-

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ing opinions in the supreme court, that perhaps the admiralty jurisdiction does not extend to contracts concerning the internal navigation of a single State. See *Maguire v. Card*, 21 How. 248; *Bondies v. Sherwood*, 22 How. 214; *Allen v. Newberry*, 21 How. 244; *Nelson v. Leland*, *ubi supra*; *New Jersey S. N. Co. v. Merchants' Bank*, *ubi supra*. None of these cases, except the first, is cited as an authority directly in point, and that case I will presently consider. But first, for the supposed reason for such a limitation. It is said that it may be derived by analogy from the limited grant to congress, by the eighth section of the first article of the constitution, of power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. Whether this clause does in fact restrict the powers of congress quite as closely as is sometimes thought, may perhaps be doubted. Certain it is, that the federal legislature has always exercised control over the building and navigation of vessels which were not intended for or engaged in commerce with foreign nations, or between different States. It has regulated the fisheries; the licensing, inspection, and navigation of yachts, tugs, and other vessels, which were not commercial in their character or occupation, or were destined only to navigate between ports of the same State. But whatever may be the just limits of the powers of congress over commerce and commercial contracts, I do not see any necessary connection between the two grants. There are strong reasons why the courts of admiralty should have cognizance of all maritime contracts, and by the constitution and laws they are granted it; and a contract is not the less maritime in its character because it relates to a navigation wholly within State boundaries. The cases of *The Genesee Chief* and others, which uphold the admiralty jurisdiction of a collision within State boundaries as a maritime tort, decide, by necessary consequence, that a contract of affreightment between the same termini is a maritime contract. And the district courts have uniformly acted on this theory, and have taken jurisdiction of causes of salvage, towage, pilotage, and collision within the harbors of the several States, as well as upon the high seas. I am not prepared to say that the case of *Maguire v. Card* requires me to overrule these numerous precedents, and to deny to these libellants the name of mariner and the remedial process of

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the court of admiralty. That case decided that such a court would not enforce a lien given by the State law, for supplies and repairs furnished a domestic vessel employed in the navigation of the Sacramento River ; and this decision appears to be rested in part upon the ground that the navigation was between ports of the same State. If that were the only point in the case, it must be held to overrule *Steamboat New World v. King*, 16 How. 469, which gave a remedy for breach of a passenger's contract on precisely such a voyage. But from the fact that this case is not alluded to, and that the point in question was not the most prominent, I am inclined to believe that the decision was intended merely to reassert the rule that, for supplies to a domestic vessel, there is no lien by the general maritime law ; and that, if the State law gives one, the courts of the United States think it more convenient not to enforce it ; as to which, see *The St. Lawrence*, 1 Black, 522, which explains this doctrine fully. I am confirmed in this view by a decision made in the circuit court for this district, in 1861, by Mr. Justice Clifford, who took jurisdiction of a libel to enforce a contract of affreightment for a voyage between Boston and Chatham, in this State : *The Emma Johnson*, May term, 1861.¹ A distinction was indeed taken, in the opinion, that the usual course of the voyage then under consideration would take the vessel out upon the high seas ; but a doubt is thrown out, whether the language of the court, in *Maguire v. Card*, was intended to apply to bays and harbors generally ; and this doubt is the more significant, because the language referred to concerning the purely internal navigation of a State, at p. 251 of the report in 21 Howard, does not mean internal by any territorial boundaries, as *inter fauces terræ*, but navigation between ports of the same State, as is abundantly evident from inspection of the whole opinion in that case ; and if that *dictum* were a decision, or, at all events, if it were one of general application, the case of *The Emma Johnson* must have been decided adversely to the libellant. I am therefore of opinion that the weight of authority, as well as of principle, is in favor of the jurisdiction in this case. *Decree for the libellants.*

L. S. Dabney, for the libellants.

C. P. Curtis, for the claimant.

¹ 1 Clifford, 633.

Re Waite & al.

Re WALTER H. WAITE & AL.

FEBRUARY, 1868.

Where a firm consisting of two partners carried on business in the name of the active partner, a promissory note given by him to the silent partner, for the amount of capital contributed by the latter to the joint stock, is the separate note of the active partner.

Where such a firm, being insolvent, and known by the partners to be so, is dissolved, and the silent partner conveys all his interest in the joint property to the active partner, who on the same day, and as part of the same transaction, mortgages the whole stock in trade to secure the pre-existing debt of a separate creditor of each partner, and neither partner had any separate estate: *held*, this transaction is fraudulent throughout, in the sense of the bankrupt law, as a preference; and both partners are liable to be adjudged bankrupt on the petition of a joint creditor, seasonably filed.

BANKRUPTCY. — This was a petition by joint creditors of Walter H. Waite and E. J. Crocker, lately partners, trading under the name of Waite alone, that they might be adjudged bankrupts, and was filed October 15, 1867.

The evidence showed that E. S. Jaffray & Company, the petitioning creditors, had encouraged Waite to set up in Boston a business in which he had had long experience as a clerk and salesman, and had lent him five thousand dollars as his capital, on his promise to procure a partner who should put in an equal amount; and they further promised, if this should be done, to give the firm a large "line" of credit. Crocker put in six thousand four hundred dollars, which he borrowed of Mrs. Badger, his wife's mother, and took Waite's notes therefor, on demand, which he at once indorsed to Mrs. Badger; and he wrote the petitioners that he was a general partner, though his name would not appear, "at first," in the firm, for reasons which he gave. The petitioners sold a large amount of goods to Waite, on credit, the price of which was admitted to be the joint debt of the firm, and their debt was larger than those of all others together.

Crocker took no active part in the business, and had no property of his own, and no experience in this kind of business. Nor had Waite any separate estate.

A short time before the joint debt to the petitioners came due, Crocker urged Waite to take an account of stock, and make an

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exhibit of the state of the partnership business. Waite did this, after much importunity on Crocker's part, and the account was finished and examined by the parties on the twenty-third of September, 1867. Crocker testified that on seeing the account he was dissatisfied with the small amount of sales, and the large amount of Waite's personal expenses, and proposed a dissolution of the firm, which was agreed to. Waite's statement was that Crocker said he was unwilling to let the money lie longer without security, and that, hoping to get a new partner, he agreed to give security. They went immediately to the office of Crocker's attorney, where a formal dissolution of the firm was drawn up and executed, by which the whole stock, &c., was made over to Waite, and he agreed to pay the joint debts. On the same day and as part of the same transaction, Waite's notes, held by Mrs. Badger, were given up, and he made out new notes directly to her for the whole amount of the old notes and the interest due on them, payable one-third on demand, one-third in four months, and one-third in eight months, with interest, and secured them by a mortgage on the whole stock in trade, furniture, and fixtures. This mortgage was the act of bankruptcy relied on by the petitioners.

T. H. Sweetser & E. H. Abbot (*T. F. Nutter* with them), for the petitioners.

B. F. Brooks, for Crocker, and *A. A. Ranney*, for Waite. Partners may dissolve their connection when they please, and whether they are insolvent or not, and their acts in this respect will be upheld by the courts: *Ex parte Ruffin*, 6 Ves. 119; *Ex parte Williams*, 11 Ves. 3; *Howe v. Lawrence*, 9 Cush. 553; *Robb v. Mudge*, 14 Gray, 534.

There was no fraud in fact intended in this case.

LOWELL, J. It is evident that the defendants were insolvent in the technical sense on the twenty-third of September, for they had no ready means to meet the large debts presently to fall due; and they were fully aware of this state of things, and discussed the means for obtaining an extension of time. If so, a mortgage of the whole stock in trade to a pre-existing creditor would be *prima facie* a preference. In England such a mortgage to a pre-existing creditor has always been held to be fraudulent *per se*, where it is of the whole stock, or of so much as will produce insolvency:

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Worseley v. De Mattos, 1 Burr. 467 ; *Newton v. Chantler*, 7 East, 138 ; *Siebert v. Spooner*, 1 M. & W. 714 ; *Lindon v. Sharpe*, 6 M. & G. 895 ; *Graham v. Chapman*, 12 C. B. 85 ; *Smith v. Cannan*, 2 Ellis & B. 35. I do not say that under our statute such a mortgage is conclusive evidence of a technical fraud ; but it is very strong evidence, because it is out of the ordinary course of business, and is of itself enough, if duly recorded, to destroy the credit of any trader, and therefore would not be resorted to by one who had readier means of paying the debt.

There is the further circumstance that Mrs. Badger was not a joint creditor as to the larger part of her debt. Crocker says he does not know whether the notes given him by Waite were intended to be joint or separate ; but Waite says they were separate ; and they must have been so, because they were given for capital contributed by Crocker, and he would not promise himself to repay it. The notes, being on demand, were subject, by the law of Massachusetts, to the same equities in the hands of Mrs. Badger that would have affected them in Crocker's, and as he was her agent, she would be bound by his knowledge, whatever had been the form of the notes. Here there is a mortgage of all the joint estate to secure a separate debt, neither partner having any separate property. This appears a preference on the face of the transaction, and the evidence rather confirms the inference than removes it. But it is said that partners may lawfully dissolve their firm, even if they are insolvent, and that their creditors will be bound by their action, though it should have the effect to convert joint into separate property to the injury of a large class of creditors. The courts have certainly gone a great way in sanctioning the dissolution of partnerships, and have held to what appear to be the logical consequences of the dissolution. But every such judgment which I have seen is qualified by the condition that the act itself should have been done in good faith. Here the evidence is very strong that good faith was wanting. The partnership articles have been destroyed, and their contents, excepting in one particular, have not been disclosed. It appears, however, that Crocker urged the taking of the account before the regular time of accounting according to the articles had come ; that he acted throughout not as a partner, but as agent for Mrs. Badger, and

with a view to her interests; and I consider it the fair result of the whole conduct of the parties, that he never intended to risk his mother's capital, but intended to get security for it whenever he should have occasion to fear an eventual loss. He had no property of his own, and no interest to dissolve the firm, but some interest to continue it with a view to possible profits.

Under the peculiar circumstances of this case, the dissolution of the partnership was a fraud on the statute, and rather an incident to a scheme for giving one creditor a preference, than a *bond fide* copartnership act. Indeed the mere dissolution itself would work a preference to the separate creditors of Waite, by converting the joint into separate assets; and where such a result is contemplated, and is the motive or one of the motives of the act of dissolving a firm, the act is voidable by the joint creditors, whether the result must be worked out through a bankrupt law or through the attachment laws of a State: *Ex parte Shouse, Crabbe*, 482; *Ferson v. Monroe*, 1 Foster (N. H.), 462.

Under the bankrupt act of 1841, a transaction which was relied on as a preference by a debtor, must have been done in contemplation of becoming bankrupt under the statute; though such contemplation might have been inferred from circumstances like those which this case discloses: *Buckingham v. McLean*, 13 How. 150. The law of 1867 is not thus limited, and requires only that the debtor, being insolvent, should do the act, with intent to prefer (see §§ 29, 35, 39): which implies, undoubtedly, that the debtor expected that some advantage would accrue to the favored creditor over the rest; that is, he must have thought it probable or possible that he should not pay all in full. Under every system of bankruptcy, such facts as appear in this case would be ample proof of the intent.

Such a mortgage, given with the intent to prefer, may be charged either as a preference or a conveyance to delay and hinder creditors, for it is both. And the creditors may well enough rely on the mortgage or on the dissolution of the firm, or on both; for it was all one transaction, and all fraudulent in the technical sense, as a preference in bankruptcy, though at common law and in equity the securing a just debt is no fraud.

This case does not raise the question whether partners can be

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adjudged bankrupt for any thing done or omitted after they have dissolved their connection, because the act of bankruptcy was contemporaneous with the dissolution and a part of the same transaction. I have no doubt that a joint voluntary petition may be maintained so long as there are joint debts outstanding, but here it is only necessary to decide that a fraudulent dissolution will not oust the jurisdiction of a joint petition *in invitum*, and that I decide.

Adjudication ordered.

CIRCUIT COURT.

JOHN LIGHTNER v. OTIS KIMBALL.

FEBRUARY, 1868.

A transportation company was organized for the purpose of providing a through line for freight between certain cities in the eastern and others in the western States, and contracted with the companies owning railroads between those cities to furnish cars for use throughout the line. The defendant was the general agent of the transportation company, with power to contract for the carriage of goods, but without power to say in what cars they should be carried, nor what axle boxes should be used on the cars. Axle boxes which infringed the plaintiff's patent were used on the cars in which the goods were so forwarded by the transportation company. *Held*, the defendant was not liable to an action as an infringer of the plaintiff's patent.

CASE for damages for using the invention of the plaintiff, known as Lightner's axle boxes, for which he has a patent. It came before the court on an agreed statement of facts in which, for the purpose of ascertaining whether the defendant is liable to an action, it was admitted that the patent is valid, and that axle boxes substantially like those described therein are used upon certain cars of the Red Line Transit Company, so called. A contract between certain railroad companies whose roads form a continuous line from Albany to Chicago, was put into the case, by which it appeared that those companies furnished freight cars in a certain proportion, and agreed to transport them upon certain terms, in order to establish a continuous daily line for freight between Chicago, as the western point, and Boston, Albany, and New York at the east. This contract contemplated the formation of a company or association to be composed of the presidents of the

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several contracting railroad corporations, and to be called the Red Line Transit Company, and this transit company purported to be the party of the second part to this contract, though it was signed only by the several railroad corporations. These corporations were to set apart certain cars, mark them, keep them in repair, &c., and the transit company agreed to see that freight was obtained and a freight train made up of these cars or some of them, and despatched each way between the termini daily. The intention seemed to be to create a legal person authorized to contract for the conveyance of goods over the whole line, with power and responsibility to superintend the conveyance for the interest of all parties. What the organization of this new company in fact was, whether a partnership or a corporation, what its by-laws, officers, &c., was not stated. The case assumed that it had some proper organization, for it found that the defendant was appointed general manager of the company. It further found that the defendant contracts with merchants and others for the transportation of goods; that the railroad corporations furnish the cars, and that the defendant has nothing to do with the cars or their construction, selection, or repair, nor any authority to direct what axle boxes shall be used on the cars or removed therefrom, nor what particular cars of the whole number furnished by the several railroad corporations shall be used in transporting the goods for whose carriage he contracts. If upon this state of facts the defendant was not liable, judgment was to be entered for him; otherwise, the case was to stand for trial.

LOWELL, J. The plaintiff contends that the transit company are the trustees or lessees of the cars, running them, or ordering them to be run, and having a special property therein which cannot be divested, even by the several railroad corporations which furnish them, until the expiration of the contract. If this be the proper construction of the contract, it may be true that the transit company are liable as infringers, but it does not follow that their agent for making contracts for transportation would be liable. It is a general rule that in actions of *tort* all the wrong-doers may be sued jointly or severally, and one cannot set up that he did the wrong by the command of another. Even this rule is not absolutely and universally true. A refusal by a servant to whom his master has intrusted goods, to deliver them to a

stranger without the master's order, has been held not sufficient evidence of a conversion by the servant: *Alexander v. Southey*, 5 B. & Ald. 247; *Mount v. Derick*, 5 Hill, 455. So when the gist of the action is a breach of *contract*, although the form be *tort*, the defendant is entitled to the benefit of the same defences that he would have had in the other form of action; and if he be a mere servant, he will not be liable, unless he can be held as a party to the contract: *Williams v. Cranston*, 2 Stark. 82; *Cavenagh v. Such*, 1 Price, 328. So a mere bailee for a particular purpose, whose custody begins and ends without notice of any defect of title, is sometimes exempted from suit: *Greenway v. Fisher*, 1 C. & P. 190. But with comparatively few and unimportant exceptions, an agent or servant is equally liable with his master or principal to actions of trespass, trover, and even case for wrongs done to the property of a third person. See *Perkins v. Smith*, 1 Wils. 328; *Stephens v. Elwall*, 4 M. & S. 259; *Wilson v. Anderton*, 1 B. & Ad. 450; *Catterall v. Kenyon*, 3 Q. B. 810; *Wilson v. Peto*, 6 Moore, 47.

It is said by an eminent judge that where the master has a color of right the servant is not bound to examine the justice of his title, but that the title must be litigated with the master: *Berry v. Vantries*, 12 S. & R. 92, citing *Mires v. Solebay*, 2 Mod. 242. There is much to be said in favor of this proposition as a matter of reasoning, but I have not found many cases which support it.

Granting, for the purposes of this argument, that every person who intermeddles with a patentee's property, that is, with his exclusive right to use his invention, is liable to an action at law for damages, this case does not show that the defendant does so intermeddle. He neither makes, uses, nor sells the invention, but is a mere stranger to the infringement, for it is agreed that he has no power or control over the matter. He is the agent of the transit company for making contracts for freight, but he does not appear to have any thing more to do with the use of the axle boxes than the several shippers who contract with him. If all merchants who ship goods by these cars, should refuse to do so until the axle boxes were changed or licensed, it might be a very good thing for the plaintiff, but they are under no obligation to do so. Nor is the defendant bound to know what axle boxes his principals

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use, or to refuse to be their freight agent until they obtain a license to use them. His defence is not that he is the servant of the transit company in doing the wrong, but that he is a stranger to the wrong done. If the servant were liable for acts of the master, instead of the reverse, there might be some ground for holding this defendant responsible for the use of the axle boxes by his principals; but the case finds that he has neither the property, the custody, nor the control of the cars in which this contrivance is used, that he can neither command the use nor the discontinuance of it, and that his duties have relation to an entirely distinct subject-matter. If the plaintiff were the owner of these axle boxes, which is a supposition more favorable to him than the fact, it is plain that he could maintain neither trespass nor any other action concerning them against the defendant; and that a demand on the defendant would be no evidence of a conversion, because he is not in a situation either to yield to or refuse such a demand.

The case of *Lightner v. Brooks*,¹ decided by the presiding judge of this court in 1864, is much in point. There the present plaintiff sued a director of a railroad company; and the court held that in the absence of evidence that the defendant had used or directed the use of the invention, he was not liable. Whether the general agent or superintendent of the company might be sued was not decided. Here it is not only shown that the defendant did not command the use of the invention by the transit company, but that he had no authority so to do. The fact that he is called a general manager is unimportant, because the agreed facts show what his powers were, and that he was not a manager in respect to the infringement. I do not find it necessary to decide whether the transit company or only the several railroad companies would be liable; nor whether in equity, where the controversy is expected to be settled in one suit, and between the parties really claiming adverse rights, a servant is ever a proper party; nor, indeed, what the precise limits are to the right to sue at law, but only that the facts here do not show that this defendant has infringed the plaintiff's exclusive rights.

Judgment for the defendant.

J. E. Maynadier, for the plaintiff.

G. S. Hale, for the defendant.

¹ 2 Clifford, 287.

Re Tanner.

DISTRICT COURT.

Re E. P. TANNER.

FEBRUARY, 1868.

A bankrupt under examination has no right to consult with his attorney before answering, except when the examining magistrate shall see good cause for allowing it. The attorney may attend, and object to improper questions.

LOWELL, J. The register, by agreement of the parties, has certified to me the question whether a bankrupt, upon his examination under section 26, has a right to answer by the mouth of his attorney. The law provides for an examination of the bankrupt in writing as to all matters concerning his trade, dealings, property, &c. It is plain, upon the whole tenor of the section, that the examination may be had before the court or before a register, and that the debtor is to be personally present, and to make answer substantially like a witness, and not merely to have interrogatories filed or propounded after the manner adopted in equity and admiralty in certain cases. Whether the requirement that it shall be in writing, means that the questions shall always be in writing, if required by either party, I do not now decide, but it is not intended that the bankrupt himself, or his attorney, shall write the answers, but merely that the deposition shall be reduced to writing, and signed by the bankrupt.

Since the examination may extend to the bankrupt's whole business life, and may involve large interests of himself and his family, and of other persons who have dealt with him, he should have every proper facility for refreshing his recollection, and for making true and careful answer. He may need to consult books and papers, and sometimes, no doubt, to consult counsel; but it seems to me impossible to lay down any general or peremptory rule of law governing such consultations.

In an early case under the insolvent law of Massachusetts, the supreme court is said to have held that the insolvent is absolutely entitled to this privilege: *Re Winsor*, 8 Law Reporter, 514. The case is very briefly reported, and without reasons given, but it has been accepted and acted upon ever since. The practice which has followed this adjudication has been, as I believe the bar will generally concede, unfavorable to the ascertainment of the truth

Re Kingsley.

in these investigations, by reason of the great labor and delay of proceeding in that mode; and there is some reason to believe, that if the question were new, the same court might now decide it differently; for in *Peabody v. Harmon*, 3 Gray, 113, they refused this privilege to a creditor under examination in support of his debt, and many of the reasons for the decision apply with great force to all examinations; and the rule there laid down, that such matters must be left to the judgment of the examining magistrate, appears to me to be the true one. It is not to be supposed that a register will deny the bankrupt, or a witness, such reasonable opportunity to see his books, and to consult concerning his rights, as will enable him to answer understandingly, and with all proper reservations, the questions that may be asked him. In England, Lord Chancellor Hardwick refused to make a peremptory order in a similar case, but recommended that the petitioner (a woman) should be allowed the privilege: *Ex parte Parsons*, 1 Atk. 204; and see *Ex parte Bland*, ib. 205. And such appears to have remained the rule of practice there: 1 Christian Bankruptcy, 385; 1 Mont. and Ayr., B. L. 385, 2d ed. The questions to a bankrupt are usually concerning matters of fact, and in the vast majority of cases, involve nothing requiring advice or consultation; and the presence of counsel, with the right to object to improper questions, and to uphold the rights of the bankrupt in substantially the same manner that he would do if his client were called to the stand as a witness in his own cause in any other court, and with the further reserved right to advise with him concerning his answers, when the register can see cause therefor, meets, as it seems to me, all the requirements of justice in this regard.

Certificate to the register accordingly.

Re KINGSLEY.

FEBRUARY, 1868.

A debt barred by the statute of limitations, of the State in which the bankrupt resides, and where his petition is filed, cannot be proved against his estate in bankruptcy.

The entry of a debt upon the schedule by a bankrupt is not such an acknowledgment, or new promise, as will revive a debt which is barred by the statute of limitations of Massachusetts.

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LOWELL, J. The questions certified and argued in this case are, whether a debt which is barred by the statute of limitations of Massachusetts, where the bankrupt has resided for the last ten years, and where these proceedings are had, but not barred by the statute of limitations of Vermont, where the creditors reside, and where both parties resided when the contracts were made, can be proved against his estate in bankruptcy. If not, whether the act of the bankrupt in entering the debt upon his schedule is such an acknowledgment, or new promise, as will revive it.

To the first question, it would seem to be a sufficient reply that the statute of limitations would bar a suit in any court of law in this district, and especially in the circuit court of the United States. For courts of bankruptcy in disputed cases must refer such questions to the other courts, or, at least, must decide them upon the same principles as other courts would. Thus, by our statute, all such disputes may be tried, either by prosecuting to final judgment a suit already pending, or where the dispute first arises after the proceedings have been begun, by trying it according to the course of the circuit court in actions at law. I cannot resist the conclusion that any plea which would be good at law (this being a legal debt) must be good in bankruptcy.

But as the question has been decided otherwise by a judge from whom I differ with great hesitation,¹ and has been argued here at length, I will proceed to show why, in my judgment, the same result ought to follow upon principle and authority, even if the mere fact that the defence is good at law were not, as I think it is, absolutely binding and decisive.

Statutes of limitations are remedial and beneficial. They are founded upon the sound principle that lapse of time, by obscuring the truth, renders the administration of justice uncertain, and that, for the sake of justice as well as peace, payment ought to be presumed after a certain period has passed. If the evidence of debt be of a high and formal nature, the evidence of payment may be expected to be more formally made, and preserved with more care, than in mere simple contracts; but even in such cases, some period works a bar. It is not a presumption of fact which may

¹ Blatchford, J., *Ray's Case*, 2 Bened. 58.

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be rebutted by proof of non-payment, but a conclusive presumption of law: 1 Greenl. Ev. § 16. So useful and important have these statutes been found, that courts of equity, when not bound by them, have adopted them as rules of practice, and they are so regarded by the circuit court of the United States sitting in equity. If there were a discretion vested in the courts of bankruptcy to adopt a new rule, it seems to me they would follow this analogy.

The point was decided in this way by Lord Eldon in *Ex parte Dewdney*, 15 Ves. 479, and afterwards reheard and reviewed by the same learned judge, when he said that his first opinion was strongly confirmed, and that he had additional reasons for it. But these he does not appear to have recorded, though he intended to do so. See note A. to *Ex parte Burn*, 2 Rose, 59; *Ex parte Roffey*, 19 Ves. 468. The reasons which he has given are ample, and have been accepted in England, and his decision, though opposed to a ruling of Lord Mansfield at *nisi prius*, and to the practice of some of the ablest commissioners of bankrupts, has been acquiesced in, and has been repeatedly recognized as law, though never again directly questioned: *Ex parte Ross*, 2 Gl. & J. 46, 330; *Gregory v. Hurrill*, 5 B. & C. 341. Besides the mischiefs which the statutes of limitations were intended to remedy, and which would be aggravated by the negligence in the preservation of evidence which they are calculated to induce, and do induce, after their bar is supposed to shield a debtor from suit, all which apply as strongly in bankruptcy as in any other form of suit, there would be special hardships to bankrupts, or supposed bankrupts, as well as to their creditors, in adopting a different rule in bankruptcy from that which prevails at law. Thus an honest debtor, who makes a satisfactory and honorable composition with all his known creditors, would be liable to be prosecuted in this court as a fraudulent bankrupt for making that very composition; and this by a person who could not sue him in any court in this district, which is the only district in which proceedings in bankruptcy could be taken against him. So upon the question whether a debtor is insolvent or not, and many other points. The mischiefs would be far-reaching and intolerable.

It is said that the bankrupt law, being uniform throughout the United States, ought to be so worked as to give every creditor who

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could sue in any State or territory of the Union the right to proceed in bankruptcy, and therefore, although it be granted that some limitation should be applied, it must be one which would be good throughout the Union. There is great plausibility in this argument, but it is not strong enough to overthrow the arguments on the other side. The right to sue must depend on the forum. Statutes of limitations relate only to the remedy, and cannot have an extra-territorial effect. If it were possible to have a statute of this kind, of general operation throughout the jurisdiction of the United States, it might be very useful, but there is none such. The general rule, therefore, sought to be applied, does not exist. If there were such a one, no doubt this debt would be barred by it, because it is a simple contract debt of more than ten years' standing; and such a debt is barred, I suppose, by the statutes of every State and territory, when applied to defendants who have been within their jurisdiction for that period. They do not bar suits against persons not within their jurisdiction, simply because they have nothing to do with them.

Most of them, perhaps, following the common-law rule of prescription, and for purposes of convenience, bar all suits after twenty years, and the result of holding that the law of the States and territories where this remedy is not sought shall be regarded, is simply to abolish the statutes of limitations, and revert to a common-law prescription. But the very fact that this debt is not barred by the laws of Oregon, or of any other State which has no jurisdiction of it, and because it has no jurisdiction of it, shows to my mind that the law of such a State ought not now to be applied to it. In such a matter as this, the courts of the United States must, in the absence of a law of congress, be guided by the law of the forum. There can be no other rule.

The argument most strongly pressed in this case on behalf of the creditor is, that the statute of bankruptcy intends that all debts should be discharged, wherever held; therefore, this debt must be discharged, and if so, it is a provable debt, for only provable debts are discharged.

There can be no doubt that this is a provable debt, and that it will be discharged by the certificate, if the bankrupt obtains one. All debts which by their nature are provable are discharged,

whether they in fact could be proved or not. Thus debts due to an alien enemy, or to one dead or insane, or who accidentally failed to prove or was not notified, all these, and many others that could be mentioned, would be barred, though it might be impossible that they could be proved. Because this debt is provable, it does not follow that it can be proved. The question is, whether it is a debt at all. A debt that has been paid cannot be proved, but it will be discharged; that is to say, the payment need not be relied on after the certificate has been obtained. It would be a singular reply to a plea of discharge in bankruptcy, that the debt was not discharged because it could not have been proved, and that it could not be proved because it had been paid, or because the court of bankruptcy found, rightly or otherwise, that it had been paid. Yet, that is all that the rejection of this proof amounts to. Applying the law of the forum, I find, as a presumption of law, that this provable debt has been paid. All provable debts are discharged; but all supposed debts, to which a certificate of discharge would be a bar, are not necessarily provable. The difference arises in a case like this, from the fact that the bankrupt law deals with the contract itself, and discharges it, and so, necessarily, has a much wider reach than the law of limitations, or than rules of evidence which touch only the remedy. The same thing is true in England, and would be so in our States, excepting that (by construction) the constitution of the United States forbids them to deal in this mode with contracts between citizens of different States. In England, the statutes of limitations and of bankrupts are passed by the same legislature; but one has a much wider operation than the other, so that a debt held in Scotland, or England, or the colonies, or abroad, may be discharged, though the statute of limitations may prevent its being proved. Mr. Christian, whose opinion and practice had been opposed to the rule as laid down in *Ex parte Dewdney*, gives us to understand, that the argument that the debts would necessarily be discharged, was not overlooked in the discussion of that case. The argument that congress, by discharging debts due throughout the Union, must intend to adopt all the statutes of limitations in the Union, proves too much. The same argument will show that it must have adopted those of all the world, for debts due throughout the world are discharged in bankruptcy, if the con-

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tract were to be performed here: *Hunter v. Potts*, 4 T. R. 182; *Potter v. Brown*, 5 East, 124; *May v. Breed*, 7 Cush. 15; Story, Conflict of Laws, § 335, &c.

The hardship of this rule is much less than might at first appear. It is only on the supposition that the creditor might possibly sue his debtor away from home that there is any hardship at all. All that the foreign creditor has to do is to sue his debtor at home, and in due season, and keep his debt alive. Our statute of limitations makes no discrimination against foreign creditors, but in some respects quite the contrary; for if he has been beyond seas, he has a longer time allowed him. If within the United States, there is no reason for any discrimination in his favor. The complaint of any creditor that he might probably find a foreign forum, which, because it is foreign, would give him a remedy which he has lost by negligence in the true and proper forum, is not entitled to much consideration. One case of practical hardship may be put, and that is when a creditor has actually sued his debtor away from home, and obtained security by attachment or otherwise, which would be taken away by the bankruptcy, and yet he would have no right to prove his debt. I consider that the bankrupt law makes a sufficient provision for such a case, by enacting that an action may be prosecuted to final judgment, and the amount of the judgment be proved in bankruptcy.

I agree with Judge Blatchford, that the bankrupt, by putting the debt upon his schedule, does not make a new promise to pay it. This depends somewhat upon the particular statute of limitations, and it has been so decided in Massachusetts in a case under the State insolvent law, so called, which is a bankrupt law, though one limited and restrained in its operation by the constitution of the United States; and it is so upon principle, because the debtor does not make out his schedule with any view to the payment, but to the discharge of his debts. And, besides, the creditors have a right to plead the statute as well as he, and they are not bound by his schedule: *Richardson v. Thomas*, 13 Gray, 381; *Roscoe v. Hale*, 7 Gray, 274; *Stoddard v. Doane*, 7 Gray, 387; and see the cases in *Roscoe v. Hale*. In those cases, it is true, the debt was not barred when the schedules were made; but if the schedules were evidence of a new promise, two of those decisions must have

Re Walker.

been for the plaintiff, because the schedules had been made within six years before suit brought. The fact weakens the argument to this extent, that it cannot be said in this case that the debtor was merely carrying out his legal duty in putting an existing debt in his list. He would not be so bound in respect to this debt, but it remains true that he did it *diverso intuitu*.

Clarke & Haskins, for the creditor.

Proof rejected.

A. A. Ranney, for the assignee.

Re WILLIAM A. WALKER.

FEBRUARY, 1868.

The bankrupt act, § 26, does not relieve from arrest one who is already in custody at the time his petition in bankruptcy is filed.

THIS petition for a writ of *habeas corpus* set out that the petitioner was arrested on mesne process at the suit of a creditor, in January last, and became bankrupt on the first day of February, but was still held in custody by the sheriff, and prayed for his discharge under section 26 of the act.

LOWELL, J. I have before decided the question raised in this case, but have reviewed the arguments on the subject in the hope that I might reach a different conclusion, but am constrained to adhere to the opinion that the bankrupt act does not relieve from arrest debtors who were in custody before the proceedings in bankruptcy were begun. By the terms of section 26 no bankrupt shall be liable to arrest "during the pendency of the proceedings in bankruptcy," which certainly appears to mean that arrests already consummated are not to be interfered with. If it had been the intent of congress to release debtors in custody, it is probable that provision would have been made concerning the effect of such release upon the debt. And it is not at all improbable that some difficulty may have been felt in dealing with this point, for the reason that the effect of an arrest is a matter of local law, and congress might doubt its competency to relieve from the arrest and yet preserve the debt, if the local law held it to be dis-

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charged thereby. I do not myself believe there is any real difficulty in the point, but it may have caused the doubt.

Looking next at the rule of the supreme court, No. 27, we find the distinction between arrests before and after bankruptcy to be carefully preserved. In the former case, the bankrupt is only entitled to be brought up on *habeas corpus* for the purpose of attending the register, &c. ; while in the latter, he is to be discharged. This rule puts upon the statute the construction which I have said is the most obvious, and no doubt the true one ; and I have reason to believe that the very point now under consideration was brought to the attention of the supreme court, and was in fact passed upon by them when they established the rule in its present form.

I must therefore refuse to issue the writ.

Petition dismissed.

 IVORY H. BARTLETT & AL. v. JOHN BUDD & AL.

FEBRUARY, 1868.

A whale killed and taken into complete possession is the property of the taker, who may maintain an action against one who afterwards appropriates it, whether with or without knowledge of his title.

Held, That an alleged usage that a whale found adrift in the ocean is the property of the finder unless reclaimed by the owner before it is cut in, was not proved in this case.

Quære, whether such a usage would be valid ?

Salvage cannot be given by way of set-off when the finder has throughout contested the title of the owner.

The measure of damages adopted in *Bourne v. Ashley*¹ adhered to.

LIBEL by the owners of the bark Canton Packet, of New Bedford, against the owners of the ship Emerald, of Sag Harbor, for the value of a whale. The first officer of the libellants' vessel killed several whales one afternoon in July, 1856, in a bay of the Okhotsk Sea, and one of these he anchored in five fathoms of water, with an anchor which he borrowed from the mate of the Brunswick, and attached to the body what whalemen call a waif, that is, some article belonging to a whale-boat which may serve as

¹ *Supra*, 27.

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a signal; in this case, a paddle and sail, and went on shore at some distance, for the night. The next morning two boats of the Emerald found the whale and towed it to their ship where it was cut in and boiled down. The witnesses on behalf of the respondents testified that they found the whale adrift, the anchor not holding, the cable coiled round the whale's body, and no waif or irons attached to it. The original taker swore that he notified them on the spot that the whale was his. This they all denied.

T. M. Stetson, for the libellants.

J. C. Stone, for the respondents.

LOWELL, J. A whale, being *feræ naturæ*, does not become property until a firm possession has been established in the taker. But when such possession has become firm and complete, the right of property is clear, and has all the characteristics of property. Upon the evidence, the right to this whale appears to stand on the same footing as the right to the anchor attached to it, which was very properly restored to its owner: *Taber v. Jenny*, 1 Sprague, 315.

The respondents here, as in *Taber v. Jenny*, set up a usage that a whale found adrift in the ocean is the property of the finder, unless the first taker shall appear and claim it before it is cut in. To this the libellants' witnesses reply that the usage only applies to whales found with no marks of appropriation excepting harpoons or "irons." And they give the very plausible reason for this distinction that irons are not in fact sure signs that the whale has ever been captured; because it may, and often does, escape after being wounded, and die at a very considerable distance of time and place from that of its being struck. These witnesses go farther, and affirm that the usage does not obtain at all in bays and harbors, but only off soundings. Without deciding the last point, I find the preponderance of evidence to be very strong in favor of the libellants' version of the usage in the matter of the definite marks by an anchor, or other sure sign of actual capture. And if it were not so, there would be great difficulty in upholding a custom that should take the property of A. and give it to B. under so very short and uncertain a substitute for the statute of limitations, and one so open to fraud and deceit. I do not, however, here pass upon the limits within which usage may reasonably vary, whether upon the one side or the other, the strict law

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of the pursuit and capture of whales and their appropriation, but decide that this whale was the property of the libellants.

This is not a case of salvage, because the conduct of the finders was inconsistent with the idea of a saving for the benefit of the true owners. *Taber v. Jenny, ubi supra*. A libel for a conversion of the whale is the true remedy, and that has been adopted.

For the reasons given by me in another case, I am unable to adopt the rule of damages which Judge Sprague followed under the peculiar circumstances of *Taber v. Jenny*, but pronounce for the value of the whale in the Okhotsk Sea in July, 1856, to be ascertained in the mode laid down in my former decision, with interest and costs.

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FEBRUARY, 1868.

Libels were brought against a ship for losses by leakage of oil shipped from San Francisco to Boston. The bill of lading contained a printed clause, "ship not responsible for rust, leakage, or shrinkage."

Held, That the printed clause changed the general rule that the acknowledgment of goods being received in good order places upon the carrier the burden of proving that he was not guilty of negligence or carelessness.

Proof of greater than average leakage on such a voyage not sufficient; but negligence on the part of the ship must be shown.

Although the leakage was probably caused by the drying of the casks; and although dry hides, rags, and wool, supposed to have a heating or drying effect, constituted a part of the cargo, negligence is not shown, it being proved that it is not unusual for these articles to form a part of the cargo of a general ship on such a voyage; and as the shippers did not expressly dissent, their assent is to be presumed to the shipping of these articles.

Proof that part of the oil was stowed between decks, where it was more subject to the injurious effects of dryness than in the hold, would not constitute negligence, that manner of loading being usual on such voyages with like cargoes.

LOWELL, J. Three libels against this ship have by consent of parties been heard together. This consolidation is highly convenient, and might have been ordered by the court upon motion of either party: *Rich v. Lambert*, 12 How. 353. The libels are brought

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by the owners of three several lots of oil shipped from San Francisco to Boston, in November, 1863, by this ship and at the same time. Bills of lading were given to two of the shippers, and one was tendered to the third and refused. It is agreed, however, for the purposes of this trial, that the contracts with the three shippers were precisely alike; and that if the contracts have been broken the libellants have a lien upon the ship, notwithstanding the charter-party. It is further conceded that the clause of the bill of lading exempting the ship from loss by leakage does not extend to leakage arising from bad stowage or other negligence of the carriers; and finally, that the allegation in the libels of a contract or usage requiring the oil to be kept wet during the voyage was inadvertently made and is not to be regarded.

Upon the arrival of the vessel early in the year 1864, it was found that a very serious loss by leakage had been sustained, amounting in value to twelve thousand dollars or more, and the question is, upon whom shall it fall.

The general rule is, that under the ordinary contract of affreightment, the acknowledgment by the carrier that the goods were received in good order throws upon him the burden of proving that any damage which they may show upon arriving at the place of delivery did in fact exist before, or was occasioned by some peril or other cause for which he is not responsible. *Nelson v. Woodruff*, 1 Black, 160, and cases there cited.

In *Clark v. Barnwell*, 12 How. 272, this general rule is recognized, with the addition that if an excepted peril is shown, which is adequate to have occasioned the loss, the burden of proof shifts, and the shipper is required to show that it was not occasioned by that peril, but by some negligence of the carrier, which rendered the peril efficient, or co-operated with it, or brought it about without any connection with the sea peril. The bill of lading here contains the printed clause "ship not responsible for rust, leakage, or shrinkage." Leakage is shown in this case; the casks all arrived, but had lost a very considerable part of their oil by leaking. It seems to me that by analogy to the rule adopted in the case last cited, the shipper is bound to show that this leakage was caused by the negligence of the officers or crew of the vessel. It may be that the exception amounts to no more than the law

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would imply, namely, that the carrier does not warrant against loss arising to certain articles by the operation of time and the ordinary accidents of navigation; but as it expressly recognizes the probability of loss by these causes, and excepts them in terms, it is for the shipper to make out that their loss is owing to other causes. It is not enough to show that it exceeds the *average* leakage, because it is not that alone which is excepted, but any leakage unless caused, in fact, by negligence on the part of the ship. I have always understood that this was the true and only effect of such stipulation. In the well known case, arising out of the burning of the steamer Lexington, it appeared that the transportation company had contracted with Mr. Harnden, through whom the libellants claimed, that Harnden alone should be responsible for the loss of any goods. The supreme court refused to construe this contract as exonerating the respondents from losses caused by their own negligence or that of their servants, but said that it changed the burden of proof, and that the libellants must show the negligence. *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 384. See *Czech v. Gen. Steam Navigation Co.*, Law Rep. 3, C. P. 14, and cases cited. So here leakage is excepted, and although leakage by negligence is not included in the exception, it is for the libellants to show the negligence. I do not rely much on the word shrinkage, because I doubt whether the shrinkage of casks causing a leak is intended by that word.

The evidence here establishes that the oil was well bedded, chocked, and dunnaged, and that no damage appeared to have arisen from its shifting; two or three casks may have moved, but if so there was no reason to suppose that any loss was occasioned thereby. In this state of the case it is unnecessary to inquire whether a more perfect mode of stowage is known to whalemén.

It is not seriously disputed that the loss was occasioned by shrinkage of the casks, and that this was caused by heat and dryness, but whether by the heat necessarily encountered in passing twice through the tropics, or by the heating and drying character of the dry hides, rags, and wool, which formed a considerable part of the cargo, or partly by the one and partly by the other, is not so clear. The libellants say that the latter was the main efficient cause, and that it was one which might and should have been

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avoided. The oil was stowed partly in the lower hold and partly in the lower between-decks ; mainly in a single tier, and where double, the second tier was oil ; it was stowed amidships, and the hides, rags, and wool, were at either end. A careful examination of the losses from the different casks seems to show that the leakage was much greater in the between-decks than in the hold. The dry hides, &c., were not stowed in actual contact with the oil in any place. The only important questions which a fair review of the evidence raises, are, whether the objectionable articles ought to have been carried on this voyage ; and if proper to be carried, whether they were properly stowed in relation to the oil ; and, lastly, whether all the oil should have been put into the lower hold.

The evidence tends to show that dry hides, wool, and rags are thought to have a drying and heating effect ; and that this injurious effect would be likely to be aggravated by stowing them upon the oil. But the testimony is clear and uncontradicted, that some one or more of these articles form part of the cargo of almost every general ship on such a voyage as this ; and that it is not unusual to carry all three of them. There is reason to believe that the masters of the three whaling vessels shipping this oil were aware that such would be the case here, and impliedly assented to it. But whether so or not, their assent is conclusively presumed, if the course of trade is proved, and they did not expressly dissent, which they did not ; and I do not know that a dissent would have been of much consequence, excepting as evidence of a new and different contract : *Clark v. Barnwell*, 12 How. 272 ; *Rich v. Lambert*, 12 How. 347.

The preponderance of evidence is, that neither hides nor any other cargo was stowed on the oil itself ; and this being so, it would seem that the whole duty of the stevedore was performed. There is an intimation from some of the witnesses, that a bulkhead should be put up between these goods and the oil. One says it is usually done in order to save the cargo from being wet with oil ; and another, that it is done to save it from water, where the contract requires the oil to be wet down ; many of the witnesses are not specially interrogated on this point, either of the fact in this case or its necessity ; and I have not been able to satisfy myself, by a careful study of the evidence, that this cargo was stowed

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differently from usual in these respects, nor that if it was, the difference was of any importance. The preponderance of the evidence, such as there is, seems to be that there was a bulkhead forward, both in the hold and in the between-decks, but none aft; but it is not shown that the presence or absence of a bulkhead had any bearing upon the shrinkage of these casks, or that it is one of the proper precautions in such cases.

An examination of the question of the place of storage results in a similar way. The witnesses are not called on to say that the between-decks was not a proper place; and it was not until the argument that the fact was distinctly brought out that the leakage had been much greater there. It would seem probable that the heat would be greater there, because it was probably in whole or in part above the water line; but whether there was room for all the oil in the hold, and whether it is commonly considered a safer and better place does not appear. It does appear that the master of the *Abigail* stipulated that his oil should be stowed in the hold, and that it was stowed there; and that the others were aware that their oil would most or all of it be placed between decks, and made no objection. Under these circumstances, and there being no single expert who has said that this stowage was not usual and proper, I must support it.

The general evidence upon the whole case is very strong that the cargo was of the kind ordinarily carried in a general ship, and that it was well stowed. And this general proof of good stowage must include all particulars to which the attention of the witnesses was not specially directed by the libellants, because they do not point out in their libel the particulars which they rely on, but only that the oil was badly stowed generally, and was unskillfully stowed "with other cargo." This allegation calls attention in a very general way to the cargo carried with the oil, and perhaps to its being in immediate contact with it, or even in the same hold with it, but not to the part of the vessel in which the oil should be placed, nor to any special protection or precautions which might be thought essential to its safety. The allegation would be fully satisfied by showing that too much weight had been placed on the oil, or that they were so stowed relatively to other goods that they would not ride well or make safe stowage.

Re Clairmont.

Much of the evidence was upon the actual cause of the great leakage and shrinkage in this case. It is shown that shippers of oil for such a voyage much prefer to have it wet down as often as twice a week, and are willing to pay for the great labor which is necessary to do this faithfully. There have been some cases in this court arising out of such contracts. This fact seems to show that there is always a considerable risk of leakage if this precaution is not taken. On the other hand, there was evidence that the loss here far exceeds what would ordinarily be expected in such cases. I have not found it necessary to make up my mind upon this point, because upon the whole evidence I am satisfied that this loss did not arise from the fault of the ship itself, nor from the want of care and skill of the claimants' agents in stowing or navigating her, but from the operation of causes which, whether common to all such voyages or not, were common to all in which the vessels happened to have such a cargo, and that such a cargo is not uncommon, but usual and proper, and that the ship was stowed in the usual and proper manner. *Libel dismissed.*

T. K. Lothrop & W. W. Crapo (J. H. Clifford with them), for the libellants.

S. Bartlett, R. H. Dana, Jr., & D. A. Gleason, for the claimants.

*Re CLAIRMONT.*¹

1868.

In passing upon the confirmation of an assignee who has been chosen by the creditors, the court must be guided by a sound judicial discretion, and ought to reject one whom there is probable cause to believe disqualified by character or otherwise from performing the duties of the place with fairness.

A person who resides out of the district, or who has a direct interest adverse to that of the creditors generally, or who is the attorney of such a person or of the bankrupt, is disqualified.

But a general creditor, or the attorney of one, or a person who has been an attorney

¹ This report contains the substance of the observations of Lowell, J., in several cases, including that of Clairmont.

Re Clairmont.

of the bankrupt in matters not connected with the bankruptcy, is not necessarily ineligible. Mere bias or prejudice arising from information concerning the conduct and dealings of the bankrupt will not usually disqualify.

LOWELL, J. The person whom the majority in number and value of the creditors choose to be the assignee ought to be confirmed, unless disqualified by residence out of the district, by personal character, or by some interest adverse to that of the body of creditors. I expect the register to report any such objection, if known to him, whether taken by any creditor or not. When objection is taken the burden of proving it is undoubtedly upon the objector, and yet in so delicate a matter, and one in which direct evidence is not always possible, reasonable cause of suspicion might in some cases be sufficient for my action, which is intended to be discretionary. The most common application is to add an assignee to those chosen by the creditors, and this is often put on the ground that two parties have been formed among the creditors who have very closely contested the election and divided the vote. I do not usually yield to this suggestion because, as was said by counsel in one case, the statute does not appear to intend a minority representation; and it is within the jurisdiction of the creditors to decide upon the number of the assignees as well as to choose them. It is suggested perhaps that one of these parties is more favorable to the bankrupt, and the other is disposed to treat him with rigor, but I do not consider that any such general bias ought to disqualify a person of standing and character. One reason is that it would be almost impossible to find, in these contested cases, any suitable assignee, connected in any way with the estate, who had not formed such an impression. When there is a failure to elect from a balance of power in different sets of creditors, the majority in number differing from that in value, I have found it to be inexpedient to undertake to compromise the difference by appointing one assignee from each side, and I shall usually in such cases go outside of the estate and take some person who is entirely unbiassed: and so where I add an assignee to those chosen. But I do not dictate to the creditors and require them to follow my example. If they choose one of their own number, I shall not usually refuse to confirm him merely because he may have taken one side in a contest of this kind, and have formed some general impres-

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sion favorable or unfavorable to the conduct and dealings of the bankrupt.

If, on the other hand, the party supposed to be favorable to the bankrupt should prevail, I should not set aside the election unless there were similar grounds for it in the character or interest of the assignee as I have already referred to. The attorney of a creditor would not be ineligible unless his constituent were, and one who has been the attorney of the debtor in matters not connected with the bankruptcy, but who has ceased to have any retainer, might be confirmed.

It must be remembered that creditors retain an important power over the settlement of the estate. They have a right to require the assignee to prosecute or defend actions, to object to the proof of debts, and to examine the bankrupt; or they can do some of these things in their own behalf if they prefer it; they ought to exercise an oversight of the affairs, and to keep the assignee advised of important facts, and they can oblige him to act upon the information given him. This being so, I look to the character of the assignee, his direct interest, if any, and his present relations to the parties to any actual or probable litigation, but not much to any supposed general bias for or against the bankrupt or his dealings.

 UNITED STATES v. WILLIAM G. REED.

MARCH, 1868.

The doctrine of charging an offence in the words of the statute, considered.

Section 25 of the act of 1866, 14 Stats. 164, requiring the maker of a still to be used for the purpose of distilling, to notify the collector where such still is to be used or sent, and by whom it is to be used, and of its capacity, &c., means that the maker of every still intended for distilling spirits within the United States must notify the collector of internal revenue of the district in which it is intended to be used, of these particulars, and an indictment should supply the omissions of the statute, and allege the offence according to its true meaning.

A charge that the defendant made a still, "to be used for the purpose of distilling," and that the same was removed with the defendant's knowledge and consent "to a district within the said United States, to your jurors unknown, without notifying the collector of the district in which said still was intended to be used" of the requisite particulars, is defective for not alleging affirmatively that the still was

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intended to be used within the United States, and for distilling spirits, and that the defendant failed to give the notice, and that the district in which it was to be used was unknown to the jury.

LOWELL, J. The defendant has been convicted under section 25 of ch. 184 of statutes 1866, 14 Stats. 154, for a failure to notify a collector of internal revenue concerning a still which he had made, and now moves in arrest of judgment for alleged defects in the indictment.

The law enacts, that any person who shall manufacture any still, to be used for the purpose of distilling, shall, before the same is removed from the place of manufacture, notify the collector where such still is to be used or sent, and by whom it is to be used, and of its capacity, &c., and if he fail to give such notice, he shall be fined. It is apparent that this statute leaves much to be supplied, and is not an easy one on which to frame an indictment. It means that when a still is made for the purpose of distilling *spirits within the United States*, the maker is to notify the collector *of internal revenue of the district in which it is intended to be so used* where it is to be used or sent, and when, and by whom, &c. I have underlined the words which the statute omits, and an indictment ought to supply them, or something which, to a common intent, will fairly express the same meaning. The general rule that the words of a statute are to be followed in an indictment is not absolutely and always true. On the one hand it is often sufficient, when the statute expresses a simple and clear meaning in one way that the indictment should give the same meaning clearly in another way. And on the other hand, when the statute is itself elliptical so that its meaning must be gathered from the context or from other parts of the same or other statutes, the indictment, which has not the advantage of such aids in its interpretation, must of itself allege a crime according to the true intent of the statute. Both these exceptions or explanations amount only to this, that the statute crime may and must be laid with reasonable certainty according to the true meaning of the law.

In this case the charge in the indictment is, that the defendant made the still at his shop in Chelsea, "said still to be used for the purpose of distilling," and that after it was made, the said still was removed with the knowledge and consent of the defendant,

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“ to a district within the said United States, which said district is to your jurors aforesaid unknown, without notifying the collector of internal revenue of the district in which said still was intended to be used ” of the requisite particulars.

This indictment fails to charge affirmatively, that the still was intended to be used within the United States, or for distilling spirits, or that it was the defendant that failed to give the notice. The statement that the collector of the district in which the still was intended to be used was not notified, is not an affirmation that there was any such district. Every fact here charged would be true of a still for making petroleum, and removed from Chelsea to Boston for shipment to Canada, and of a failure by the person who removed it to notify the collector, and of a still intended to be used in a district well known to the grand jurors ; for their ignorance is of the district to which it was removed which is not averred to be the same in which it was intended to be used.

I do not find here the certainty of allegation which the criminal law, wisely or not, requires in charging an offence.

Judgment arrested.

H. D. Hyde, assistant district attorney, for the United States.

R. Morris, for the defendant.

THE GEORGE GILCHRIST.

MARCH, 1868.

A brig and cargo valued at about \$95,000 were saved from a position of much danger, in the daytime, by a valuable steamer which employed thirteen persons and took four hours for the service, without much danger to the steamer. The property might probably have been saved by another steamer that was in sight. \$2800 awarded as salvage.

SALVAGE. — At daylight on Saturday the fourteenth day of December, 1867, the steamer Monohansett, which is employed as a packet between New Bedford and Edgartown, was at the latter port, when her master was informed that a square-rigged vessel was lying close to the shoals about ten miles to the eastward.

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A very severe north-east gale and snow-storm had been blowing for two days, and the steamer's fires had been kept up in anticipation that her services might be wanted for the rescue of some vessel in distress. The storm had abated a good deal, and the weather was no longer thick. She immediately proceeded out into Vineyard Sound, and found the brig, George Gilchrist, at anchor in a very dangerous position; the brig's cables were buoyed and slipped, and she was towed into Edgartown, the whole service having occupied about four hours.

The cargo was worth \$72,700; the brig, \$18,500; and the freight, \$3,750; in all \$94,950. The steamer was manned by thirteen persons, including a pilot, taken for the occasion, and was worth about sixty thousand dollars. The pilot was not expressly named in the libel, but it was agreed that the decree should be for a gross sum, including his services, and that he should file a sufficient release of damages.

LOWELL, J. The only difficulty here, and it is a considerable one in all these cases, is to ascertain the fair amount of salvage to be awarded. As bearing upon this a very large number of witnesses have been examined concerning the character of the place where the brig was lying, which was between two shoals called Long and Shovelful shoals, and her probable chances of escape without assistance. The shoals were under her lee and almost surrounding her, and she could not have got out in the direction in which she had drifted in, without a change of wind. It was discovered afterwards that one of her anchors was gone, that the other had lost its stock, and that her kedge only was uninjured. During this morning the tide was setting against the wind, and it is maintained by the libellants that she would probably have dragged, upon a turn of the tide. The wind was still from the north-east, with no immediate prospect of change, and the sea was very heavy. Whether she could have got out by the narrow passage between the two shoals to leeward, has been the subject of much controversy. Many disinterested witnesses for the libellants assert that the chart gives too much water at that point, and that there is really not over ten feet, while this vessel drew eleven feet and upwards.

Upon all the evidence, I am satisfied that the brig was in a very

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awkward situation, much more so than her master, who was ignorant of the state of his anchors, was aware of, and that it is extremely doubtful whether she could have reached a place of safety without the aid of a steamer or a change in the wind. The aid which was rendered was prompt, efficient, and successful. On the other hand, the storm had lulled, though perhaps not ended; she had daylight, was uninjured except in her ground tackle, and might probably have been rescued, if the Monohansett had not come up, by another steamer which had seen and was coming towards her.

This is one of those cases in which a disabled vessel is opportunely and successfully taken in tow, but in such a place, that she might count with pretty strong hope on other assistance in default of that of the actual salvor. In such a case the need of succor is not so urgent as to make the amount saved the most important element of the salvage service, though it is not to be overlooked; but the point first in consequence is the risk, trouble, and expense, as well as the knowledge, skill, and seamanship which the salvors have contributed to the result. As compared with the recent case of the *Acacia*, the value here saved is about double, and the risk from which it was saved is greater, because there the danger would not be urgent until a change of wind, while here it was imminent unless there were such a change; and the knowledge of the ground, the skill and seamanship required to go safely to the vessel, take her in tow, and get her out were greater; and there was some risk to the steamer in doing all this so near a lee shoal. On the other hand, the steamer is very much less valuable than were the steamer and her cargo in that case, and the time lost is much less. I will add that I am not sure that I gave quite enough in that case. Considering all the circumstances, I award the sum of \$2500 and costs.

Decree accordingly.

J. C. Stone & W. W. Chapin, for the libellants.

J. C. Dodge, for the claimants.

This decision was affirmed by the circuit court on an appeal by the salvors. — October Term, 1868.

Re William S. Walker.

Re WILLIAM S. WALKER.

MARCH, 1868.

Where a bankrupt born in Boston, became domiciled in California, but left that State with no intention of returning, and after staying without the limits of the United States several months, returned to Boston, and in less than two months thereafter filed his petition in bankruptcy, *held*, that the act of leaving California with no intention of returning, at once revived the domicile of origin, and his petition to be adjudged bankrupt was rightly filed in Massachusetts.

LOWELL, J. A creditor petitions to vacate all proceedings in this cause for want of jurisdiction, averring that the bankrupt had not resided in this district for the greater part of the six months next preceding the filing of his petition, as alleged by him and required by law. The adjudication of bankruptcy by the register, being *ex parte*, is not conclusive of this point, and this mode of reviewing it has not been objected to.

The petition to vacate was by consent referred to the register, Mr. Rogers, who has heard the parties and reported his findings of law and fact, together with the evidence; and neither party has desired to be heard in argument. The law wisely provides that proceedings in bankruptcy should be taken in the place where the debtor resides or has his place of business; and to prevent sudden and fraudulent changes, that if he has had two such homes within six months, he must proceed in the district where he has been domiciled the longest. It is not always an easy matter to determine where a person does, in legal contemplation, reside. Mere casual absence for business or pleasure will not change the domicile, though it may change the place of business; and one whose domicile is here may institute proceedings here, though he may have been staying in another district during the whole of the six months. When a person has been trading and travelling in several parts of the world, as has this debtor, the question is often one of delicacy and difficulty. In the present case it is complicated by a serious conflict of evidence. No question arises concerning the place of business, because he had none within the United States during any part of the six months.

The bankrupt, who is unmarried, was born in Boston, and has lived here for the greater part of his life. There is a house here,

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that of some near relative, as I suppose, where he usually stays. During some years he traded in several of the western States, and the register finds the weight of evidence to be that he was domiciled in California a part of the time, including September, 1866. He left that State in November, 1866, and swears that he had no intention ever to return thither, and that he left no property, business, or connections there; he was next in Paris and France for about eleven months, and left that country for Boston in November, 1867, and arrived here on the eleventh of December; he was arrested early in January at the suit of this petitioner, and has been imprisoned ever since. On the the twenty-ninth of January he filed his petition in bankruptcy. The register finds that he came to Boston intending to remain; he reports in favor of the jurisdiction, on the ground that the debtor resided in Boston for the longest period of the six months that he had any actual residence anywhere. I affirm the report, though not for the precise reason given by the register. If Walker was domiciled in California until the eleventh of December, he cannot, whatever the hardship of his case, become bankrupt in Massachusetts on the twenty-ninth day of January; a construction of the word resided, which makes it mean only personal presence, is inconsistent with the statute and the reasons of it; but upon the evidence and the finding, he must be considered as domiciled here from November 19, 1866, the day on which he sailed from San Francisco, to this time. The general rule is, that a domicile once acquired remains until a removal has been effected to some other place with intent to remain there. But there is an important exception in favor of the native domicile, by which a mere removal from the new or acquired home, with intent to return to that of origin, revives the latter, *eo instanti*: Story, Conflict of Laws, § 47; *The Venus*, 8 Cranch, 253; *The Indian Chief*, 3 Rob. 12. Of course the abandonment of the acquired domicile must be absolute and final: *Cragie v. Cragie*, 3 Curteis, 435; but if it be so, the domicile of origin revives. It is of no consequence that the return home is not immediate or by the shortest road. If the fact of a final abandonment of the new, and the intent to return to the old concur, the domicile is changed from the time that the new is actually left. See the case of Mr. Curtiss, cited 3 Rob. 21, note (a), who staid four years in Hol-

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land, the enemy's country, on his return from Dutch colonies, but whose property was restored on the ground that his English domicile revived when he left the Dutch colony. Mr. Westlake states this exception with some hesitation, but finds it supported by authority: Westlake, Private Intern. Law, p. 39 (§ 40). So, in this case, the return by the way of France, and the stay of eleven months there for a temporary purpose, does not prevent the operation of this principle. The weight of the evidence is that Walker never intended to return to San Francisco, but left that city intending to resume his home here, which indeed he says he had never given up; but upon this point I follow the register, who saw the witnesses. I must conclude that the debtor was a resident of Boston, in the sense of the bankrupt law, during the whole of the six months next preceding the filing of his petition.

Petition to vacate proceedings dismissed.

C. S. Lincoln, for the petitioner.

A. W. Boardman, for the bankrupt.

 UNITED STATES v. THIRTY-THREE BARRELS OF SPIRITS.

MARCH, 1868.

To warrant a forfeiture of tools, implements, instruments, or other personal property, under section 48 of the internal revenue act of 1864, 13 Stat. at L. 240, as amended by the act of 1866, 14 id. 111, upon the ground that they are found upon premises where an illicit manufacture is carried on, it should appear that such property was used, or intended to be used in such manufacture, or was in some way connected with it.

THIS was an information filed against the contents of a building upon Central wharf in Boston, to enforce a forfeiture under the internal revenue law. The property was claimed by John Lombard. Upon the trial it appeared that the building in question was of four stories in height. In the attic story there was a still, and here, as the evidence indicated, a business of distilling had been carried on in violation of the revenue law. The second and third stories contained barrels, chemicals, and other articles of a character adapted to the distilling business. The first floor was occupied by a retail grocery store, and contained a stock

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of goods such as are ordinarily kept for that business. The counsel for the government contended that all the property found in the building was forfeited; and the jury found a verdict condemning the entire property accordingly. The claimant now moved for a new trial and in arrest of judgment.

L. S. Dabney, for the claimant.

W. A. Field, assistant district attorney, for the United States.

LOWELL, J. In this case there is a motion for a new trial, on the ground that the verdict is against the weight of the evidence; and a motion in arrest of judgment. The information, as amended, alleges in the fifth count that certain distilled spirits were found at number 45 Central wharf, Boston, in the possession, custody, and control of one John Lombard, for the purpose of being sold by him in fraud of the revenue laws; that two hogsheads of molasses were found at the same place in the possession of said Lombard, and were raw materials which he intended to manufacture into distilled spirits, for the purpose of fraudulently selling the same, and evading the taxes thereon, and that the other goods, wares, merchandise, and property seized, which appear to form the stock, furniture, and fixtures of a retail dealer in liquors and groceries, were tools, implements, instruments, and personal property found at the same time and in the same building with the spirits and the molasses, and in the possession, custody, and control of the said Lombard.

The other amended counts differ from the fifth count, in substance, only as to the person in whom the custody is alleged to be.

The law under which the information is brought is section 48 of the act of 1864; 13 Stats. 240, ch. 173, as amended by the act of 1866; 14 id. 111, ch. 184. As the act stood at first, all goods, &c., on which duties are imposed, which shall be found in the possession, &c., of any person for the purpose of being sold or removed in fraud of the internal revenue laws, may be seized and shall be forfeited; and so of raw materials intended to be manufactured for the purpose of being so sold; and also all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or enclosure where such articles are found, *and intended to be used by them (i.e., the persons before mentioned) in the manufacture of such raw materials.*

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The new statute amends the phraseology of this section in several other particulars, without perhaps much variation of the meaning, but omits altogether the qualifications of intended use of the tools, implements, instruments, and personal property, and upon a literal interpretation might seem to subject to seizure and forfeiture all goods and chattels and other things coming within the very general description of personal property, to whomsoever they may belong, if found in the same building, including out-buildings, yard, &c., with the offending goods. It is impossible to believe that any such sweeping condemnation is intended to be passed, founded upon mere proximity in place, upon the goods of all persons, innocent and guilty. In its application to a city or other busy place, where the same building is divided into numerous tenements, shops, offices, counting-houses, and warerooms, all being often found under one roof, and each occupied by a different tenant, the operation of such a law would work the most enormous and unheard of injustice. To take a single example: the money in the vaults of a bank might be forfeited for the fault of some petty trader in the attic of the banking-house. It is a rule of law as well as of natural justice, that statutes will not be understood to forfeit property except for the fault of the owner or his agents, general or special, unless such a construction is unavoidable. See *Peisch v. Ware*, 4 Cranch, 347; *Freeman v. Four Hundred and Three Casks of Gunpowder*, Thacher, Crim. Cas. 14.

This information does indeed allege that the personal property sought to be confiscated was in the possession or under the control of the wrong-doer. But even if the statute be limited in that way, it will be most arbitrary and unjust in its operation, for the punishment will bear no sort of necessary relation to the offence. The crime is punished by the same section with a fine of five thousand dollars, or double the amount of tax; but this forfeiture may be indefinitely greater than either. But the more valid reason against this construction is, that nothing in the statute itself points to the possession or control of this personal property as deciding its status, but only the place where it is found. A forfeiture of the goods of the same owner, found with the unlawful goods, is not without precedent in revenue laws, and I was at first disposed to believe that such was the meaning of the statute,

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but upon a more careful inquiry, I am satisfied that the construction presently to be mentioned, is more consistent with its language. By reason and analogy, as well as by the context, we find that some real connection with the fraud is intended to be attached to the property that is liable to seizure. The taxed articles and the raw materials intended to be manufactured, are the principal things, and the tools, implements, instruments and personal property, are only the connected incidents. I am of the opinion that by the familiar rule of construction, called *noscitur a sociis*, we must restrict the general words, personal property, by the more particular and immediately preceding words, tools, implements, and instruments. Such a restriction has been adopted in many well considered cases. Thus, where it was enacted that no tradesman, artificer, workman, laborer, or other person whatsoever, should do or exercise any worldly labor, business, or work of their ordinary callings upon the Lord's day, the court of king's bench held unanimously that this did not include drivers of stage-coaches: *Sandiman v. Breach*, 7 B. & C. 96. So any artificer, calico printer, handicraftsman, miner, collier, pitman, keelman, glassman, potter, laborer, "or other person" who shall contract with any person whomsoever, for any time or times, does not include domestic servants: *Kitchen v. Shaw*, 6 A. & E. 729; 1 N. & P. 791.

Other examples of a restricted construction of the general words of a statute are, *Rex v. Manchester Water Works*, 1 B. & C. 630; *Rex v. Mosley*, 2 id. 226; *Coolidge v. Williams*, 4 Mass. 140; *Sprague v. Birdsall*, 2 Cow. 419. And in the construction of deeds and wills, it is not unusual to confine general expressions by a regard to the context. Thus, "all my estate of what kind soever" being connected with words referring only to chattels, was held not to pass real estate: *Sanderson v. Dobson*, 1 Exch. 141. In the present case, the words "tools, implements, and instruments," are carelessly used, and are mere surplusage, if the general words "personal property" are intended to include them. Why mention tools and implements if every thing but real estate is to be confiscated? And if any specification is desired, why not specify the property much more important, and more likely to be found in such a connection; namely, the stock in trade, notes,

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, &c., before the general words? It cannot be doubted that tools, implements, and instruments here forfeited, are those in which the unlawful business is carried on; and if that is so, does not their enumeration exclude all other tools, implements, and instruments? If a carpenter's tools, a surgeon's instruments, a dressmaker's sewing-machine are found in a distillery, can they be forfeited as tools, implements, and instruments? If not, they are tools and implements, how can they be swept in as personal property? It must be on the very ground that they are connected with the fraud, and then the statute will read "All tools, implements, and instruments of the unlawful business shall be forfeited, together with all other tools, implements, and instruments, and personal property which have no such connection." No fair, sensible, or reasonable construction can be put on the particular words, without supplying the qualification which I have adopted; and when you have supplied that, it is the operation of the more general words which follow. If the statute is read as forfeiting the tools, implements, and instruments, and personal property connected with the unlawful business, and found within the building, yard, or enclosure where the business is carried on. This construction gives effect to all the language, because there are often many things connected with the business or manufacture which are not properly described as either tools, implements, or instruments; as, for example, fuel, fixtures, &c.

This construction entirely relieves the difficulty concerning the building, yard or enclosure, because it is reasonable that things which are part of the unlawful business, and are found in the same enclosure, whether inside or outside of the building, should be forfeited, and that all articles appropriate to the business which are so found, should be *primâ facie* presumed connected with the fraud. This interpretation makes the law just, harmonious, and intelligible.

New trial granted.

United States v. 100 Barrels of Distilled Spirits.

UNITED STATES v. 100 BARRELS OF DISTILLED SPIRITS. — THE SAME v. 50 BARRELS OF DISTILLED SPIRITS. — THE SAME v. 30 BARRELS OF DISTILLED SPIRITS. — THE SAME v. 20 BARRELS OF DISTILLED SPIRITS.

JUNE, 1868.

Under § 179 of the act of 1864, as amended by that of 18th July, 1866, 14 Stats. 145, officers of internal revenue may, in many cases, be informers.

The informer, under that statute, is he who first gives to some officer authorized to act upon it information which leads, in fact, to the seizure and forfeiture.

An officer who obtains such information through the examination of witnesses compelled to testify before the grand jury, or one who acts on information furnished him as an officer, and intended by his informant to be given the government, and does not discover new facts by his own diligence, or who merely makes certain what was suspected, is not the informer.

THESE four lots of whiskey, amounting in all to two hundred barrels, were seized in Boston and informed against under § 45 of Stat. 13th July, 1866, ch. 184, 14 Stats. 163, and, after default, were condemned and sold. Against the proceeds of sale seven persons filed petitions as informers.

It appeared, in evidence, that in August, 1867, three hundred barrels of whiskey were taken from a warehouse (class A.) attached to Perry's distillery in Buffalo, upon bonds for transportation to a certain warehouse in Boston. The bonds were not in evidence; but it was said to be the course of business, that goods so taken might be sent to any lawful warehouse in the designated district, and that thirty days were usually allowed for the transportation, and that the bonds gave thirty days' time for the transportation. — When such goods reach the warehouse, the collector and certain other officers of the district should examine the goods, and compare them with the permits, and certify that they had been received in warehouse, and their gauge, &c., and when this certificate was produced to the collector of the former district, and paymer had been made for any loss by leakage or otherwise beyond what is allowed by law, the transportation bonds would be cancelled. In this case, certificates in due form were produced to Mr. Root, the collector at Buffalo; and Mr. Sprague, a deputy-collector there, examined them, and discovered errors and discrepancies in carrying out or adding some of the figures, and the collector, at his

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request, sent them back to General McCartney, the collector here, for correction. Mr. McCartney at once discovered that the certificates were forged, and so telegraphed to Mr. Root, who, in reply, asked that the facts might be kept secret for a time, until he could make further investigation. Some days after, Mr. Root sent Mr. Hawley, a special revenue agent, to Boston, with instructions to investigate the fraud. Mr. Hawley found that General McCartney had gone to Washington, but he consulted with the assessor and with the district attorney, and some other officers, and then went with Mr. Sanderson, an inspector, to the station of the Albany Railroad Company, where they examined books and made other inquiries, and discovered that the whiskey had been brought to Boston and delivered at a certain storehouse. Here they lost trace of it; but they obtained the names of some of the teamsters who had carried it either to or from the storehouse. These facts and names they reported to Mr. Hyde, assistant district attorney, who summoned the teamsters before the grand jury, then in session, and by his inquiries thus prosecuted — but how immediately or remotely his results depended on Hawley's information did not at all appear — he was led to suspect that some of the whiskey had been carried to certain places in Boston. Many searches were made, and many of the conjectures proved to be unfounded; others were more fortunate. Among other things, Mr. Hyde told Mr. Horton, an inspector, that some contraband whiskey would probably be found in some warehouse in Lowell street; and Mr. Horton proceeded to examine the warehouses in that street, and in one of them found one hundred barrels, part of the goods which were seized and condemned. There were no inspection marks whatever upon these barrels; and whether or not they were a part of the Perry whiskey was disputed, and there was but little evidence upon the subject.

Mr. Hyde afterwards received some information of a vague character, which led him to suspect that some of the whiskey would be found in the warehouse of a Mr. Johnson, on or near Northampton street, if Mr. Johnson had any such warehouse, which was only suspected. He asked Mr. Hayes, an inspector, to search; and Hayes found such a warehouse, and the fifty barrels proceeded against in one of these suits. By their marks they appeared to be a part of the Perry whiskey.

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Again, Mr. Hyde traced, as he thought, a part of the spirits to the shop of certain persons on Worcester street, and there lost the clew, and he told Mr. King, who keeps a stable near that shop, that if he would find the goods he would be entitled as informer; Mr. King succeeded in finding the twenty barrels. These had no inspection marks.

The remaining thirty barrels were seized by Mr. Hayes, upon information given him by W. H. Swift that certain barrels were stored in a cellar, hired by the informant's brother, in Federal street, under suspicious circumstances. The marks upon these barrels warranted the inference that they were from Perry's distillery. Swift testified that he had no knowledge of the search for Perry's whiskey, or of any facts excepting those which he himself discovered.

Mr. Sprague, the deputy-collector in Buffalo, alleged himself to be the first informer in all the cases, because he discovered the clerical errors which led to the discovery of the forgery; General McCartney did the like, because he first discovered the forgery which rendered it certain or highly probable that some fraud had been committed; and Mr. Hawley, likewise, because he discovered some facts which enabled Mr. Hyde to discover others which led to the seizure of much of the whiskey; Mr. Horton claimed against the hundred barrels which he seized in Lowell street; Mr. Hayes against the fifty found by him in Johnson's warehouse; and Mr. King and Mr. Swift against the twenty and thirty barrels discovered by them respectively.

LOWELL, J. The statute under which the petitioners proceed is § 179 of the statute of 1864, as amended by that of 13 July, 1866, 14 Stats. 145, 6, which declares that all fines, penalties, and forfeitures which may be imposed or incurred [under the act], may be sued for, &c., and that a certain part shall be to the use of the person, to be ascertained by the court which shall have imposed or decreed any such fine, penalty, or forfeiture, who shall first inform of the cause, matter, or thing whereby such fine, penalty, or forfeiture shall have been incurred.

A good deal of stress was laid, in the argument, upon this language; and it was contended that no one was included in its terms who did not give information of the precise fraud, by the commission of which the goods became liable to forfeiture. My opinion

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is, that the meaning of this law is not substantially different from that of the customs act of 1799, § 91, 1 Stats. 697, which gives the share in one clause to the person *in pursuance* of whose information the forfeiture, &c., are recovered, and in another, to any officer of a revenue cutter *in consequence* of whose information they are recovered. "Fines, penalties, and disabilities are not *incurred*," says Mr. Justice Thompson, "and do not accrue in the technical sense of the terms until judgment: *U. S. v. Morris*, 10 Wheat. 299. In the ninth section of the act of 1866, 14 Stats. 101, the share of the fine therein referred to is for the person who shall give the information whereby it is imposed; and in still another section, the share is to go to the informer, if there be any, without further description. Under this statute, as under the other, and under the ordinary offers of reward for detection of a criminal or discovery of lost property, the first informer is he who first gives to a person authorized to receive it important information, which, in fact, leads to the desired result. And the offer is not necessarily confined to persons who shall expose the details of the fraud. Thus, if the government officers were already aware of the offence, but were unable to trace the goods, and the informer supplied the necessary facts; or if the informer, without knowing precisely what fraud had been perpetrated, knew of suspicious circumstances sufficient to justify a seizure, &c.; in these and similar cases, the person who gave the information by which the forfeiture was in fact decreed or imposed, would be within the fair intent of the act.

Accordingly, I have no hesitation in deciding that W. H. Swift is the first informer in respect to the thirty barrels found in his brother's warehouse in Federal street. It was in consequence of his information that they were seized and forfeited, and it does not appear that any facts of importance were furnished by any one else; and whether he was fully cognizant of the cause which rendered them liable to forfeiture or not, he was sufficiently so for all the practical purposes of the government. All the information it already had would have been useless without him, and his was sufficient, independently of what they possessed. It is not essential that an informer should act as prosecutor or be called as a witness; it is enough that the result is in fact reached primarily through his means: *Sawyer v. Steele*, 3 Wash. C. C. 464; *Besse*

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v. Dyer, 9 Allen, 151; *Crawshaw v. Roxbury*, 7 Gray, 374; *Smith v. Moore*, 1 C. B. 438.

Similar considerations govern the case of King. The officers had exhausted their clow, and had traced the whiskey as far as they could, and abandoned the search, and the assistant district attorney, who gave King some information, makes no claim. It is clear that one who does not choose to be an informer may enable another to become so, even as against his own subsequent demand: *Fallick v. Barber*, 1 M. & S. 108; and it appears to me that Mr. King is entitled to the benefit of whatever knowledge he derived from Mr. Hyde, and is the informer in respect to the twenty barrels which he discovered. I do not mean to say that Mr. Hyde could himself be the informer.

The cases of the several officers of the revenue service present more difficulty. If the point were new, it might perhaps be open to argument that an inspector or other officer owes his whole time to the government, and that there is no consideration for a promise to pay him a further reward for the zealous discharge of his duty. But the treasury department and the courts have acquiesced in the decision of Judge Ware, in *Hooper v. 51 Casks of Brandy, Daveis*, 370, and it must be taken as settled that an officer of the revenue may, in some cases, be an informer. And the practice has been similar under the internal revenue laws, and rightly, as the statutes themselves show. Still it is clear that an officer cannot always be considered an informer merely because he as an officer acquires information useful to the government. If this knowledge is acquired in the ordinary discharge of his duty touching the very subject-matter, or under a special retainer to investigate that matter, I cannot hold him entitled to a gratuity.

I may take an illustration from the case of Mr. Hyde, whose information appears to have been of great use to the government, but who, in pursuance of a settled policy adopted in the district attorney's office, makes no claim as informer. His knowledge was obtained by the examination before the grand jury on oath of witnesses whom he compelled to attend; in other words, it was obtained by virtue of the great powers which the government confides to its prosecuting officers; but it is evident that the information obtained by the exercise of such a power must be for the use of

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the government in whose name and behalf it is demanded of the witnesses, and not for that of the prosecuting officer, the jury, or the witnesses themselves.

Similar considerations apply to all officers who are clothed with the duty of making an investigation on behalf of the government, whether with more or less ample powers.

In my view the cases in which an officer may be an informer are, where he incidentally and not in the direct prosecution or course of his duty or of any special retainer for that purpose, makes a discovery ; as if an inspector put on board a vessel merely to keep the cargo safely, discovers smuggled goods concealed ; or where an officer sent to inquire into a particular charge discovers something entirely different and before unsuspected ; or where he is told by some one, as a friend and not as an officer, of facts which his informant, not wishing to be known, refuses to bring forward himself, but tells him for the very purpose of enabling him to give information in his own name ; in these cases an officer may be informer. I do not at present think of any others.

Mr. Hawley's case, which has given me more trouble than any other, must be governed by these considerations. In my judgment his retainer as a revenue agent, under pay, to investigate these frauds, makes his time the time of the government, and his information the information of the government, and he cannot justly lay claim to any share of this reward.

And so of General McCartney and Mr. Sprague. They merely in the course of their duty pointed out to the persons to whom they were bound to point them out, the mistake in figures and the forgery which they respectively discovered ; they had no choice to give or withhold the information, and their action had no reference to any forfeiture. I doubt if the fact in either case was of sufficient importance to entitle them as informers ; but if it were, its bearing on the forfeiture was only incidental ; the act was a mere statement of a fact occurring in the course of their business, which they could not but state if they did their duty, and the mere stating of which cannot make them informers in the sense of the law.

Mr. Horton and Mr. Hayes were merely the seizing officers, and I have held before, and shall continue to hold until otherwise instructed by superior authority, that an officer who has merely fol-

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owed instructions and made a seizure which he was asked to make, although he may have exercised great skill and ingenuity, is not an informer. A recent customs act gives the seizing officer a share of forfeitures in cases where there is no informer, and I dare say this law may be wise and expedient so long as the policy of paying informers is adhered to, but it only confirms the view that a seizing officer, as such, is not an informer. It is strongly urged that the barrels seized by Mr. Horton are not proved to be a part of the Perry whiskey, and that if they are not he is the sole discoverer, because Mr. Hyde sent him to find only Perry's whiskey. But in such a case the burden is very strongly upon the officer to show that they are different. He was asked to look in Lowell street for contraband whiskey, without any particular description of it; he looked there and found some, and there is very little evidence either way concerning the article found. The presumption is almost irresistible that it is the same whiskey he was looking for. The argument that this whiskey, if Perry's, ought to have been condemned under a different section of the statute, proves too much; for eighty of the barrels were Perry's, and were condemned under this section. That argument might have availed a claimant; but as it is admitted that Perry's whiskey was liable to forfeiture under another clause, and as there was no defence, it may well be that the court did not inquire as carefully as it otherwise might have done, whether the evidence pointed more strongly to one or another violation of the act. I do not mean to say, however, that there was not sufficient *prima facie* evidence to entitle the government, in a defaulted action, to a condemnation under section 45.

Upon the whole, I grant the petitions of King and Swift, and deny the others.

Ordered accordingly.

W. A. Field, assistant district attorney, for the United States.

W. Curtis, for W. H. McCartney.

J. A. Loring, for N. P. Sprague.

F. A. Prescott, for L. Hawley.

T. M. Hayes, for J. K. Hayes and C. M. Horton.

L. S. Dabney, for G. M. King and W. H. Swift.

Re James B. Devoe.

Re JAMES B. DEVOE.

JUNE, 1868.

Where a bankrupt whose case is pending in one judicial district, is arrested on *mesne process* in another, the district court of the district in which he is arrested has jurisdiction to issue a writ of *habeas corpus* for his release.

If, in such a case, the writ on which the bankrupt is arrested sets out a fraud, so that his certificate of discharge, if obtained, could not be pleaded in bar of the action, he is not entitled to be released from the arrest.

On such a hearing, evidence cannot be admitted to prove that no such cause of action as is declared on in the writ on which the bankrupt was arrested in fact exists. The record is conclusive evidence of the cause of action.

THE petitioner for *habeas corpus* alleged that he had been duly adjudged a bankrupt by the district court for the southern district of New York, on the twenty-sixth day of May, 1868; that the proceedings in bankruptcy were still pending; and that he had been arrested in June, and was still held imprisoned at Boston on a writ issued out of the superior court for the county of Suffolk in Massachusetts, in an action founded on a debt from which his discharge in bankruptcy would relieve him. The writ of *habeas corpus* was issued in accordance with the twenty-seventh rule of the supreme court in bankruptcy, and the return set out a copy of the writ on which the petitioner was held, which was *tort* in the nature of deceit, alleging certain false and fraudulent representations and inducements, whereby the bankrupt was alleged to have procured of the plaintiff a transfer of a stock of goods, accounts, &c.

C. A. Reed & G. M. Reed, for the bankrupt. We can show that there never was any such fraud committed, and we ask to have the case sent to a register to report whether the arrest is for a debt or demand founded in fraud, from which the bankrupt's discharge will not release him: *Re Kimball*, 6 Int. Rev. Rec. 215; *Re Glaser*, 1 B. R. 73.

By the act of 5 February, 1867, 14 Stats. 385, we may traverse the return and show the truth of the case.

A. Russ, for the respondent.

LOWELL, J. The statute of 1867 gives the district court authority to hear this case, because the petitioner alleges that he is unjustly detained under State authority in contravention of a law of the United States. But that statute does not require or author-

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ize me to ascertain on *habeas corpus* the truth of the case set up against the petitioner, but only the legality of his imprisonment so far as the laws of the United States are concerned. If, by the terms of the bankrupt law, he is entitled to be released, I must release him ; otherwise not.

By the bankrupt law the petitioner is not entitled to his release, because the action in which he is arrested is not founded on a debt from which his discharge would release him (§ 26). Perhaps the demand is one which the creditor might have treated as a debt, but it is plain on inspection of his writ that he has not done so, but sues for deceit.

The petitioner offers to prove that he never committed any such fraud. This point is not open to him. The law, at the place just cited, is that he shall not be liable to arrest in any civil action unless the same is founded on some debt or demand from which his discharge in bankruptcy would not release him. There is no other evidence of the nature of an action than the action itself, that is to say the writ and declaration, and as upon inspection of these this action appears to be founded on a fraud, the petitioner cannot be discharged. If no fraud has been committed, the plaintiff has no cause of action ; but that does not show that the action is founded on a debt that will be discharged by bankruptcy, but only that it has no foundation whatever. I have no power to release, in this mode, persons who are unjustly imprisoned on State or on federal process, but only those who are irregularly detained. I cannot try the merits of an action by *habeas corpus* whether the petitioner happens to be a bankrupt or not.

I should not have thought it worth while to write an opinion in a case which seems to me elementary, but for the authorities cited, which seem to show that in one of the districts evidence has been permitted to be given concerning the merits of the action on which a bankrupt is arrested. I suppose, however, those decisions only amount to this, that where the action shows a mere debt, the creditor may prove that the debt was founded in fraud, and so would not be discharged in bankruptcy. Possibly that may be a correct practice ; but it is only adding a fact concerning which the record is silent. It can never be allowable to contradict the record, and show by evidence that a declaration in deceit means one in assumption, or is wholly unfounded.

Relator remanded.

Dunham v. N. E. Mut. Ins. Co.

THOMAS DUNHAM v. N. E. MUT. INS. CO.

JULY, 1868.

A decree of the high court of admiralty in England for damages for collision, though satisfied, is not a bar to a suit against an insurer of the injured vessel, when the amount of the decree is proved to be less than the loss actually suffered. The decree in England is *res inter alios* and cannot be relied upon in a suit between the insured and the insurer, excepting to show the fact of satisfaction *pro tanto*. There is no such privity between the underwriter and a third person who may be liable for the same damage as that between joint trespassers or joint contractors. The decree is absolutely binding on all parties and privies and on the *res* itself; but as between the insurer and the insured can only be invoked to show the amount awarded and paid, and not as evidence of the collision, its causes or its consequences. Wilful or negligent conduct on the part of the insured by which salvage is lost might discharge the underwriter, as fraud certainly would. In such a case the amount recovered from the wrong-doer is to be taken from the gross amount of the damage, and not from the loss adjusted as a partial loss with a deduction of one-third new for old.

LIBEL in admiralty upon a policy of insurance by which the respondents underwrote the libellant's bark *Albina* against perils of the seas, &c., alleging that while so insured the vessel was damaged by collision in the British Channel with the ship *Donald McKay*, for which collision cross-libels were brought in the high court of admiralty in England, and a decree was rendered in favor of the *Albina* and condemning the *Donald McKay* as being wholly in fault, and that the libellant has received the damages decreed to him by the court, but that for some reason unknown to him the court did not allow him the whole amount of the losses and expenses actually incurred, and that the respondents are bound to pay him the remainder.

The answer set up the decree in England as a bar to this proceeding, and this was the only question submitted to the court at this time.

F. C. Loring, for the libellant.

H. C. Hutchins, for the respondents. The libellant had his election to sue us in the first instance. If he had recovered the insurance we should have had our recourse to the *Donald McKay*, which the libellant could not have released or impaired: *Hart v. Western R. R. Co.*, 13 Met. 99; *Yates v. Whyte*, 4 Bing. N. R. 272.

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Having elected to proceed against the ship, the libellant has prevented us from having any action of that kind. He has disabled himself from subrogating the underwriters to any other damages than those which he has recovered. We are within the reason of the rule that a satisfaction obtained of one co-trespasser bars a suit against the others, namely, that a satisfaction has been once had: *Murray v. Lovejoy*, 3 Wallace, 1.

The libellant, in effect asks this court to review the decision in England, and to pick out certain items disallowed there, and say that they should have been allowed. This cannot be done. If the decree there can be opened at all it must be opened in full and the question of fault be examined anew. But in fact that court had jurisdiction of the parties and of the subject-matter, and the libellant and respondents are both concluded by the decree: *Peters v. Warren Ins. Co.*, 3 Sumner, 389; *Croudson v. Leonard*, 4 Cranch, 434; *Williams v. Armroyd*, 7 id. 423; *Imrie v. Castrique*, 8 C. B. (N. S.) 405; *Loring v. Neptune Ins. Co.*, 20 Pick. 411.

LOWELL, J. I am of opinion that no good bar to this proceeding is shown. The decree in England is *res inter alios*, and is admissible in evidence here only to prove satisfaction *pro tanto*. True, there can be but one satisfaction, but the decree does not prove that full satisfaction has been obtained, because there is no privity between the insurance company and the Donald McKay as joint contractors or joint trespassers which shall make a satisfaction obtained from one a conclusive settlement in favor of the other. Between the assured and his underwriter the former is only bound to good faith and reasonable diligence. If the underwriter pays the loss, he is subrogated to the rights of the assured against third persons: *The Monticello*, 17 How. 155; *Garrison v. Memphis Ins. Co.*, 19 How. 312; *Randall v. Cochran*, 1 Ves. Sen. 98; *Yates v. Whyte*, 4 Bing. N. R. 272; *White v. Dobinson*, 14 Sim. 273. If the assured recovers of the others he must give credit for the amount recovered, and if he fraudulently refuses to prosecute and attempts to release a trespasser, he must still give credit for all that he might have recovered: *Atlantic Ins. Co. v. Storrow*, 5 Paige, 285; *Hart v. Western R. R. Co.*, 13 Met. 99; and wilfully negligent conduct by which the underwriter had lost his remedy might have the same effect. But it does not follow that the judgment recov—

ered by the assured against the trespasser is conclusive evidence of the amount of the loss. Try it in the reverse case, and suppose the decree not to have been satisfied, without any fault on the part of the assured, would it be evidence against the underwriter of the amount of the loss? Or would a compromise effected in good faith and with reasonable diligence discharge the insurer?

I admit the soundness of the argument that if the decree is to be received as evidence of any fact excepting that it was made and has been satisfied, it should be admitted for one party as well as the other, and in this particular the libel appears to rely upon the decree for more than it will bear. I do not propose to examine that decree. It is conclusive on the *res* and on all parties to it, including the underwriters, so far as the Donald McKay is concerned, but it is not evidence as between these parties of the fact of the collision, its consequences, or its causes. It is open, as I have said, to the respondents to show that the libellant might have recovered more by due diligence, but in the absence of any such allegation or proof, and upon this hearing as the parties have chosen to arrange it, I cannot admit it as a bar. The case most analogous to this is *Pentz v. Receivers Aetna Ins. Co.*, 9 Paige, 568, arising out of the disastrous fire of 1835 in the city of New York. In that case Chancellor Walworth held, overruling the Vice-Chancellor, that the assured could recover the amount of his actual loss, deducting the damages he had obtained from the corporation on the verdict of a jury assessing the same loss, which the city were collaterally bound to pay under a statute by virtue of which they had destroyed the plaintiff's house in order to check the fire. And see the remarks of Shaw, C. J., in *Hart v. Western R. R. Co.*, 13 Met. 105, &c.

By the agreement filed in this cause, it was to be sent to an assessor if any damages were recoverable by the libellant; and in strict compliance with the stipulation I might have contented myself with a simple reference, because it must be conceded, as it was at the argument, that the expenses of asserting the libellant's rights against the Donald McKay would be a just charge against the underwriters, or, what is the same thing, a just deduction from the credit to be made them, and so would any loss of interest that may have occurred during the prosecution of that suit. But as

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the main question intended to be raised by the agreement would at once recur in making the assessment, I felt bound to express my views upon it.

Interlocutory decree accordingly.

After this decree was entered, the parties filed their respective adjustments, and stipulated that these should be treated as alternative reports of an assessor. No evidence was given of any fraud or negligence on the part of the libellant or his agents, but it did appear that for some unexplained reason he had not recovered in the collision suit the whole of his loss. The question of law arising out of the admitted facts, and argued by the same counsel who spoke to the cause before, was whether the damages recovered in England should be deducted from the gross amount of the repairs, or the partial loss should be assessed first, and the credit be allowed against it. In the latter case, the assured had already been largely overpaid, by the operation of the rule deducting one-third new for old, while in the former there was a balance due him.

LOWELL, J. The respondents insist that the libellant in this insurance cause must be governed by the law of insurance, according to which his loss is conclusively presumed to have been but two-thirds of the expense of repairing his vessel. It accords better with the truth and justice of the case that the assured should have the benefit of this difference in the rules of damages. In truth the payment by the trespasser, whether of a greater or less sum, is made on account of the gross damages and not of the net, and by the rule governing the application of payments the assured has a right to apply it as it is paid. Suppose the parties had in good faith and with due diligence compromised the dispute, and the alleged wrong-doer had in fact made two-thirds of the repairs, and the assured the remaining third, specifically; or, what is more likely to happen, suppose the admiralty court had found both parties in fault and had given the assured one-half the gross damages, must he credit the sum so recovered as three-quarters of his damages when he receives it as one-half? It is obvious that the respondents are claiming the benefit of both rules, as each happens to work in their favor; it is two-thirds when they are paying, and the whole when they are receiving. They cannot justly

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object that their rule is so worked as to credit them with two-thirds the gross receipts when they pay but two-thirds the gross costs and expenses of repairs.

A considerable, though not a full and strict analogy is found in those cases which decide that the value of old materials sold by the assured is to be deducted from the gross repairs: *Byrnes v. National Ins. Co.*, 1 Cowen, 265; *Brooks v. Oriental Ins. Co.*, 7 Pick. 259; *Eager v. Atlas Ins. Co.*, 14 Pick. 141. It is urged that if the loss had been adjusted and paid by the respondents in the first instance, they would have been subrogated to the rights of the assured, and might have recovered the whole loss, and that whatever sum they had recovered would have gone to indemnify them in full in the first instance, before any obligation would arise on their part to account to the assured; and that the order in which the suits are brought cannot affect the rights of the parties. No authorities are cited for this proposition, excepting those which establish the general principle of subrogation. Subrogation is a doctrine of courts of equity, and I am not prepared to admit that when a person has paid two-thirds of a debt, he will, in equity, be subrogated to the whole security. No doubt the assured may, if he choose, assign his whole demand against the wrong-doer to the underwriters, and he may do so, perhaps, by acts and refusals to act as well as in express terms; but in such a case the rights of the parties will depend upon the terms, express or implied, of the assignment itself, and not upon the relations which are created by the contract of insurance. The liability of the trespasser may be likened to a collateral security, not furnished by the underwriters, and in which they have no interest excepting to see it properly applied. The ship-owner has the right to apply it to the loss to which it is properly applicable, namely, the gross loss; and the underwriters have no right to say that it shall be applied to any thing else.

Decree for the libellant.

On appeal, the circuit court certified to the supreme court the question whether a proceeding upon a policy of insurance was within the jurisdiction of the admiralty, and this question having been answered in the affirmative, the decree of the district court was affirmed on the merits, May term, 1871.

CIRCUIT COURT.

CHARLES SPRING v. THOMAS RUSSELL, *Collector*.

MAY TERM, 1868. Before CLIFFORD and LOWELL, JJ.

Where goods are imported into a port of entry and warehoused there, and are intended to be and are transported to another port, in bond for rewarehousing, the entry is to be completed at the former port, and it is the duty of the collector of that port to have the goods properly examined, and if they are invoiced too low by more than ten per cent, to assess and levy the penal duty.

The collector of the second port has no authority to levy the penal duty on such goods by virtue of a new appraisement made under his own direction.

Articles 460 and 468 of the general regulations require a report to the treasury department in such cases, but there appears to be no law or regulation which authorizes a new levy of duties.

Nor can the collector at the original port of entry make an addition to the invoice value, upon mere hearsay information derived from the collector at the second port, and without notice to the importer, and after the goods have left the first port.

At a port where there are no appraisers, a deputy-collector may examine goods entered for warehousing, to ascertain their dutiable value, as well as the collector.

THE plaintiff bought 1000 barrels of flour at Toronto, Canada, in March, 1867, and in April sold the same to J. G. Hall & Co. for exportation, both parties residing in Boston. In May, 1867, 237 barrels of this flour were shipped from Toronto for Boston, and entered at the port of Ogdensburg by a clerk of the railroad company in behalf of the plaintiff, who was not in fact aware of their arrival, and were forwarded to Boston in bond. There were no appraisers at Ogdensburg, and one of the deputy-collectors examined the flour and exhibited samples to competent judges, and being of opinion that the invoice value was correct, permitted it to be shipped. The business was conducted in the mode usual at that port. The officer did not certify his appraisement on the invoice, but the value and estimate of duties contained in the entry was the same as that in the invoice, and this was passed and the duties were estimated accordingly.

The plaintiff entered the flour for rewarehousing at Boston, and before he did so asked leave to make an addition to the invoice value, but was told by the entry clerk, to whom persons usually

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apply for information in such matters, that he could not do so. J. G. Hall & Co., the purchasers of the flour withdrew and exported at different times all but sixty-three barrels, and these sixty-three were then sent to the appraisers in Boston, who found the value in the invoice too low by more than ten per cent. The defendant, who is the collector at Boston, then sent back to Ogdensburg the copies of the entry and invoice with the additions made by the appraisers here, and a deputy-collector there, other than he who had made the original examination of the goods, assented to the additions, and noted them on the original invoice and returned the copies to the defendant, who thereupon levied and collected a penal duty of twenty per cent *ad valorem* on the whole 237 barrels, and refused to deliver the sixty-three barrels, then in his custody, until this sum was paid. Payment was made by the plaintiff under a protest in due form. No fraud was shown in any thing connected with the importation.

LOWELL, J. Transportation of goods duly warehoused at one port of entry to another port of entry in the United States to be again deposited in warehouse is authorized by § 2 of ch. 84 of the laws of 1846, 9 Stats. 54, and § 5 of ch. 30 of the laws of 1854, 10 Stats. 272, and is further regulated by Gen. Reg. Treas. Dep. (1857), arts. 432-472. From these acts and regulations it is clear that the entry at the port of importation is to be complete, and the duties are to be then and there estimated before any transportation can be allowed. Thus section 1 of the act of 1846, which is the first and principal warehousing act, provides, in terms, that the proper duties are to be ascertained on the due entry of the goods for warehousing, and it is obvious that this is the only safe and proper time and place for ascertaining the same; and such has been the universal practice. Articles 432, 438, 439, and 463 of the general regulations are very full and explicit on this point, and indeed it would be impossible to comply with the statute without such estimate being made, because the bond provided for by the act of 1854, § 6, and prescribed by article 446 of the regulations, is conditioned among other things for the payment of the duties in a certain contingency, and they are to be ascertained and indorsed on the transportation bond. See also section 4 of ch. 147, 1830, 4 Stats. 410.

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Nor can it be doubted that it was the duty of the collector at Ogdensburg, if he found the invoice value less than the true market value by more than ten per cent to assess and levy the penal duty. The statute under which it was levied is section 9 of ch. 298, acts of 1866, 14 Stats. 330, and there are other earlier acts upon the subject, especially section 7 of ch. 80, acts 1865, 13 Stats. 494, and these laws show that the penal duty is to be assessed as soon as the undervaluation is discovered; and article 439 expressly provides that such additional duty must be ascertained and paid before any withdrawal for transportation can be allowed.

The agreed facts, and the letter from Ogdensburg which was read by consent as part of the case, prove an examination at Ogdensburg, and for aught that appears a due examination there, and by the proper officer, a deputy-collector: statute 30 Aug. 1842, § 22, 5 Stats. 566. Some doubt was suggested whether the collector must not personally act as appraiser at a port where there are no permanent appraisers, but we see no reason why this should be the only function of the collector which he may not perform by deputy. It has been held that the deputy is the substitute for the collector, with the like powers and duties as his principal, so that an oath required by statute to be taken before the collector is well taken before his deputy, without proof of the absence or illness of the principal; and this on an indictment for perjury: *United States v. Barton*, Gilpin, 445. Much more would this rule apply to a civil case in which it is not shown that the collector was present or capable of acting in the particular case.

No increase of dutiable value having been made at Ogdensburg when the goods were entered, the first question is, whether another deputy of the same collector there could afterwards raise the value upon information derived from Boston, and without further actual knowledge or examination, and without notice to the importer that the goods were to be appraised anew.

The power of a collector to order a reappraisement of goods before they have gone out of the hands of the importer cannot now be doubted: *Iasigi v. The Collector*, 1 Wallace, 375. But we are not prepared to say that this can be done on mere hearsay information, and without either a new examination of the goods, or of the books

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or papers of the importer, and without notice to him. The second appraisement should be made in the same manner and with the same care as the first, and a like regard must be had to the rights of the importer. We must hold this reappraisal invalid.

The next question is, whether the addition to the invoice value could be properly made by the appraisers here, and whether thereupon the defendant could and did lawfully assess and levy the additional duty. The regulations of the treasury department, already referred to, and especially arts. 460 and 463, provide that a copy of the entry for transportation and of the invoice shall be sent to the collector here, and that he shall cause the goods to be again appraised in the same manner as if on an importation from a foreign port, and if it should appear by the report of the appraisers that the appraisement at the original port was too low, or the classification was improper, the collector shall call upon the appraisers for a statement of the grounds of their opinion, and transmit the same to the department for its consideration, and such investigation as may be necessary. These rules were not followed in this case. Instead of reporting to the department, the defendant reported to the collector at Ogdensburg, and upon his assenting to the addition, proceeded to assess the duty. We understand that this action of the defendant was in accordance with the practice at this port, and very possibly at others in like cases, but we have not been informed of any general regulation of the department which authorized it. Whether the secretary of the treasury could, by a general rule, lawfully authorize an assessment of duties upon the basis of an appraisement made at the port of entry for rewarehousing may admit of great doubt. We have seen no law which warrants any such proceeding, but on the contrary all the statutes appear to contemplate that the appraisal shall be at the port of original entry. It may be highly useful that a second appraisement should be made as a guard against fraud, and to secure, through the supervision of the department, that most important result, uniformity of action at all the ports of entry; and such we suppose to be the true object of the general regulations above referred to; but that the new appraisement can supersede or supplement the old in the action of the collector in the particular case, in the absence of fraud

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or collusion, is a proposition that we should be obliged to examine with great care, if this case required it; but it does not, for the regulations do not purport to authorize the action taken in this case. We have already seen that the collector at Ogdensburg was not authorized to make the addition, in the mode in which he did make it, and it is equally clear that no law or regulation that has been cited authorized the collector here to do so; and we are of opinion, therefore, that the assessment and levy were void, and that the plaintiff is entitled to recover the sum paid, with interest from the day of payment.

M. E. Ingalls, for the plaintiff.

Judgment for the plaintiff.

W. A. Field, for the defendant.

BENEDICT REISER v. F. E. PARKER, *Administrator*.

MAY TERM, 1868. Before CLIFFORD and LOWELL, JJ.

In an action here to recover a certain number of pounds sterling payable in London, the measure of damages is the intrinsic value of the pounds measured in our dollars, which the evidence showed to be very nearly \$4.86 to the pound.

Whether the rate of exchange can be regarded, *quaere*.

The cases on the subject of allowing the rate of exchange considered.

The constitutionality of the legal tender acts was not considered, because that point would be more properly raised when the judgment was to be paid or collected.

ASSUMPSIT by a resident of London, England, to recover a balance of account of £849 6s. for goods sold. The case was submitted to the court, without a jury, and most of the facts were agreed in writing. Upon the rate of exchange at different times evidence was taken. The date of the writ, 15 September, 1864, was agreed to be the day of the breach by non-payment. At that time the pound was worth in United States treasury notes about eleven dollars, and at the time of the hearing it was worth about six dollars and sixty-four cents. According to the course of dealing between the plaintiff and the defendant's intestate, who was a resident of Boston, the money would have been remitted to London if he had lived. The question for the court was the amount for which judgment should be entered.

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R. D. Smith, for the plaintiff.

R. T. Paine, Jr., for the defendant.

LOWELL, J. The decided cases and the principles of law and of the theory and practice of exchange which bear upon the case, have been carefully and ably presented to us in the arguments of counsel to which we must admit our great obligation. The plaintiff contends that we must treat the pound sterling as merchandise and assess its value, at the time of the breach, in the most usual currency of this country, according to the judgment in *Essex Co. v. Pacific Mills*, 14 Allen, 389; or, if not, that we must assess his damages according to the rate of exchange reckoned in currency. The defendant insists that we must give the real par of exchange in all cases. He contends, besides, that the legal tender acts are unconstitutional, and so the assessment must be in gold.

The question whether in an action for a debt payable in another State or country, not being a bill of exchange, the damages are to be so assessed as to give the rate of exchange prevailing in the country where the suit is brought, has been decided differently by different courts. The cases cited, or which we have found in favor of the allowance, are *Smith v. Shaw*, 2 Wash. C. C. 167; *Cropper v. Nelson*, 3 Wash. C. C. 125; *Lee v. Wilcocks*, 5 S. & R. 48; *Scott v. Bevan*, 2 B. & Ad. 78; *Delegal v. Naylor*, 7 Bing. 460. Mr. Justice Story and Chancellor Kent have expressed their opinions in favor of this rule: Story, *Conflict of Laws*, §§ 308-312; *Grant v. Healey*, 3 Sumn. 523; 3 Kent Com. (5th ed.) 117 note *a*; and see *Cash v. Kenyon*, 11 Ves. 314.

On the other hand, it has been held that the par of exchange ought to be considered, without regard to the cost of remittance or the balance of trade, in the following cases: *Martin v. Franklin*, 4 Johns. 124; *Scofield v. Day*, 20 Johns. 102; *Adams v. Cordis*, 8 Pick. 260; *Alcock v. Hopkins*, 6 Cush. 484; *Burgess v. Alliance Co.*, 10 Allen, 228; *Weed v. Miller*, 1 McLean, 423; *Cockerell v. Barber*, 16 Ves. 461.

The argument in favor of allowing the rate of exchange is that the plaintiff is entitled to have his money at the place agreed on. Against it, the reply is that the court can award only the debt due, and cannot inquire what the plaintiff intends to do with his money

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after he receives it, and cannot fix by its decree the day when he shall receive it. We do not make a careful examination of the arguments, or of the authorities, because in the present case the evidence is that exchange reckoned in gold was at par on the day to which most of the evidence was addressed, that is the day of the date of the writ, meaning by par the actual value of the pound at our mint, or \$4.86; and the only witness who gives the value at the time of the hearing, gives a variation of less than two cents in a pound from the real par. And it is to be observed that the courts which adhere most firmly to the rule of the par of exchange, have modified their views to meet the objections of Judge Story and Chancellor Kent, and now award the *actual par*, or \$4.86, and not the mere nominal and obsolete par of \$4.44, which they originally adopted: *Bush v. Baldrey*, 11 Allen, 369; *Swanson v. Cook*, 45 Barb. 574; and thus agree to the correctness of the rule laid down in § 309 of the Conflict of Laws, that they are to "allow that sum in the currency of the country where the suit is brought which should approximate most nearly to the amount to which the party is entitled in the country where the debt is payable, calculated by the real par and not the nominal par of exchange," so that the only dispute now remaining is whether the fluctuations arising from the course of trade, which between England and this country, when both countries are trading on a gold basis, are comparatively insignificant, shall be regarded.

But in this case, as we have said, the evidence is that exchange reckoned in gold was at $9\frac{1}{2}$ to $9\frac{3}{4}$ above the nominal par, which is equivalent to the real par of \$4.86, so that the question for us is whether the plaintiff is to be allowed \$4.86, or about \$11.00 for each pound sterling due him, that is whether his damages are to be reckoned in gold or in paper. If not assessable at the high rate which prevailed at the date of the writ, the plaintiff would still contend for such an assessment as will now procure him £849 6s., say at from \$6.67 to \$7.00 to the pound.

The difficulty in the case arises out of the fact that we have two currencies, one of which unfortunately does not possess the steadiness of value which is the first requisite for the standard of other values. In this case, for example, if the pound is reckoned in paper at the date of the breach, the plaintiff will now obtain about

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thirteen hundred pounds in gold for the eight hundred and fifty pounds due him; while, on the other hand, if his debt shall be reckoned in gold and paid in paper at its present value, he will receive only about £600 for the same debt. Exact justice, if we could administer it, would seem to be met by ordering him to receive an approved bill of exchange for £849 6s. and interest, or such a sum of money as on the day of payment, if we could foretell it, would buy such a bill. As we can neither oblige the defendant to give nor the plaintiff to receive a bill of exchange, we must reckon his damages in our money.

And it seems to us that the only safe rule is to compare the pound and the dollar in a case of this kind upon a gold basis. This is the rule adopted in *Hussey v. Farlow*, 9 Allen, 263; *Bush v. Baldrey*, 11 Allen, 369; *Swanson v. Cooke*, 45 Barb. 574; *Ross v. The Patrick Henry*, Dist. Ct. S. Dist. N. Y., July, 1867, Shipman, J. The pound sterling has always been treated as money here, though foreign money, as a standard of value and not as a commodity. Up to 1857 it was a legal tender in the payment of debts, and its value is still fixed by law for estimates at the custom house and for payments by and to the treasury: Stat. 27th July, 1842, 5 Stats. 496. Its value has a known and precise relation to that of our coin, so much so as to have become a question for the court rather than the jury, but it has none to our paper, because the latter is constantly fluctuating. We think it would be unsafe, and on the whole likely to work injustice, if this value were to be considered an open question in each case. The evidence is that the persons who deal in remittances almost always make their quotations in gold. They have found that to be the only safe and prudent course, and we find it so.

* This is not a contract to deliver foreign coin here at a certain day, and there is no presumption of law or fact that a creditor in England having an open account with a person here for goods sold, would, on the day it became due by demand of payment, remit to himself in England if the debtor failed to do so. His damages are the amount of his debt, and not what the debtor might then have been obliged to pay in a depreciated currency to liquidate it. We know that, in fact, the pound has not changed its value, but has only seemed to change, and the practical diffi-

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culty for us is to follow the fluctuations. If we give judgment to-day for a certain sum, and it is paid in paper, we cannot tell that the amount may not by the time of payment be much more or much less than the equivalent of the plaintiff's pounds.

The validity of what is called the legal tender law has been argued by only one of the parties to this cause, and in the view which we have taken is not involved in its decision. If the plaintiff desires to raise that question, he can do so when payment is made or offered upon the judgment, by refusing a tender of notes.

Judgment accordingly.

NOTE.—This decision was given before the supreme court had established the practice of entering judgment in gold or in currency, according to the rights of the parties in each case.

 UNITED STATES v. J. A. BOYDEN & AL.

JULY, 1868.

In an indictment under the act of 2 March, 1867, § 80, 14 Stats. 484, for a conspiracy to defraud the United States, the subject-matter of the conspiracy is sufficiently described as, "The taxes arising from and imposed by law upon certain ~~diver~~ proof gallons and quantities of distilled spirits, distilled in the United States, ~~then~~ and there situated in certain bonded warehouses," describing the warehouses. The precise kinds, quantities, and qualities of spirits need not be stated, ~~because~~ the description is sufficient to show that the goods were liable to taxes.

The overt acts need not be laid as having been done "to effect the object" of the conspiracy, although these are the words of the statute; it is enough to say that they were done "in pursuance" thereof, which are the usual words in conspiracy.

An officer of the revenue may be joined with other persons in such an indictment, without charging him as an officer, notwithstanding that by the act of 31 March, 1868, § 6, 15 Stats. 60, such an officer is liable to a greater penalty than other persons. But under such an indictment he can only be sentenced to the lesser punishment.

The caption of the indictment may be referred to to show that the United States mentioned in the body of the indictment are the United States of America.

If a defendant is aware that one of the jurors is asleep during some part of the trial, he should call attention to the fact at the time. It is not ground for a new trial if first brought forward after verdict.

THE defendants were indicted under Stat. 2 March, 1867, § 30, 14 Stats. 484, for a conspiracy to defraud the United States of the

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taxes arising from and imposed by law upon certain divers proof liquors and quantities of distilled spirits, distilled in the United States, then and there situated in certain bonded warehouses (described). The indictment contained twelve counts, and filled sixty-two folio pages, reciting in great detail the mode in which the alleged conspiracy was carried into effect. After a general verdict of guilty against Boyden and Cleaves, the former moved in arrest of judgment, and the latter in arrest and for a new trial. Cleaves was a revenue officer, but was not charged as such in the indictment.

H. W. Paine & R. M. Morse, Jr., for Boyden. 1. The description of the goods is not sufficient; neither quantity nor quality is given, and nothing by which they can be identified. The decision in *Reg. v. Blake*, 6 Q. B. 126, which sustains such an indictment, has been doubted by the best text writers. And see *Reg. v. King*, 7 Q. B. 795. 2. The overt acts are laid as having been done "in pursuance" of the conspiracy, while the language of the statute, which should have been strictly followed, is "to effect the object" of the conspiracy.

G. A. Somerby & L. S. Dabney, for Cleaves. Besides the objections already taken, Cleaves relies upon others: 1. The evidence showed him to be an officer of internal revenue. Now, by Stat. 1 March, 1868, § 6, 15 Stats. 60, such an officer, who shall conspire or collude with any other person to defraud the United States, shall be held to be guilty of a misdemeanor, and on conviction, is liable to an imprisonment of three years, which exceeds the maximum of punishment under the act of 1867, and therefore repeals it so far as officers are concerned. 2. The person whom it was intended to defraud is ill laid in the indictment, which charges that the "United States," instead of the United States of America, were the objects of the conspiracy. 3. One of the jurors was asleep during a part of the trial.

G. S. Hilliard, district attorney, and *H. D. Hyde*, assistant district attorney, for the United States.

LOWELL, J. The goods are sufficiently described to show that they were liable to a tax. The internal revenue laws tax all distilled spirits as such, without further description, and with a few trifling exceptions, which are strictly exceptions, so that even in

an indictment for distilling without due authority, it is not essential to describe the particular kind of spirits. The case of *Reg. v. Blake* is remarked upon by Sir W. Russell, in the late edition of his work on Crimes, vol. iii. p. 152 n., on the ground taken at the argument of the case itself, that "certain goods" did not show that they were in fact dutiable. It was admitted in that argument that a description like the one in *Rex v. Everett*, 8 B. & C. 114, "certain goods and merchandises, to wit, spirituous liquors," would have been well enough. A more accurate description is not required, because the corrupt agreement is the gist of the offence, and it may be, as was the fact here, that the parties had not the precise bales or packages of goods in view when they made the agreement. Quantity and quality are not important in a case of this kind, and the description used in the statutes imposing the tax is sufficient. In the case cited from 7 Q. B., the persons intended to be defrauded were merely described as certain liege subjects of the queen, being tradesmen. The simple mode of describing a person is to name him, or if he is unknown, to allege the fact, but to designate goods by their statutory and commercial name is enough.

The rule of pleading which requires a crime created by statute to be laid in the very words of the statute, has perhaps been carried too far in some cases. But it has no proper bearing upon the second point taken here, because the acts set out are no part of the offence, and may in themselves be innocent. The purpose of the law is that a mere agreement, however corrupt, shall not be punished as a crime, unless it has led to some overt act; and any form of language which shows that such an act has been done to carry out the agreement, is sufficient. Thus in treason, the overt act is never charged to be an "open deed," nor is it usually alleged that the compassing, &c., were expressed in any "overt act or deed" in the exact language of 25 Ed. III., or 36 Geo. III., ch. 7. So in New York and New Jersey, where the statutes require some act to be done to "effect the object" of the conspiracy, indictments follow the more usual language adopted in this case, and charge the acts as having been done "in pursuance" of the agreement: *People v. Fisher*, 14 Wend. 9; *People v. Chase*, 16 Barb. 495; *State v. Norton*, 3 Zab. 33.

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In Cleaves's case, the fact that he is an officer does not require the government to charge him as such. He is still a person, and if the government is content with the lesser punishment, they may proceed under the general statute. It has been the practice in this court, under the post-office acts, which punish clerks and other persons employed by the department much more severely for tampering with the mails than persons not under any such engagement, to proceed against clerks, where justice seemed to require it, without charging them in their official capacity. Under Stat. 52 Geo. III., ch. 143, a similar practice was upheld: *Rex v. Salisbury*, 5 C. & P. 155; *Rex v. Brown*, cited Russ. & Ry. 32, note *a*, and more fully, 2 Russell on Crimes (4th ed.), 570. So 7 & 8 Geo. IV., ch. 29, § 46, punishes very severely servants who steal from their masters; and it was held that a servant might be convicted of a simple larceny: *Reg. v. Jennings, Dearsley & Bell*, C. C. 447. Where the act may be charged as an offence against two different statutes, as, for instance, where the conspiracy and the completed offence are separate crimes, or where the crime charged includes in its definition one of less magnitude, the conviction may be of either crime: *Bank Prosecutions*, Russ. & Ry. 378; *State v. Parmelee*, 9 Conn. 259; *Reg. v. Neale*, 1 Car. & K. 591; 1 Denison, C. C. 37. Indeed, in one case it appears to have been held that a defendant who has by one act contravened two statutes, may be convicted under both: *State v. Sonnerkalb*, 2 Nott & M'C. 280. Moreover, in this case the offence must be laid under the act of 1867, which is the only statute of the United States defining conspiracy. The statute of 1868, which punishes officers for that crime, does not define it, but leaves us to the common law, or the statute of 1867, to ascertain what it is. It cannot be the common law, because this would make officers liable without an overt act, while the persons with whom they conspire are not guilty until something has been done to effect the object of the conspiracy; and this cannot be presumed to have been the intention of congress. So that the true construction of both statutes is, that if two or more persons conspire to defraud the United States, and either of them commits an overt act, and one of them is an officer, the latter is liable to a more severe punishment. But he must be indicted under the earlier act, or under both together,

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and this is at the option of the prosecutor. If he elects not to charge the defendant as an officer, he can ask only the lighter sentence.

I have fully considered the evidence and arguments bearing upon the motion to set aside the verdict against Cleaves. It is not denied that he did several acts which were contrary to his duty as an officer; but it is urged that these may not have been done as part of the conspiracy, and that he may have been merely bribed. The acts being proved, and some of them having a tendency to aid the conspiracy, and no other probable or possible motive being shown but to aid it, the jury, under the instruction that any act done in furtherance of the corrupt agreement, with knowledge of its existence, would make the person doing it a conspirator, were well warranted in finding as they did.

Upon referring to the caption of the indictment, it seems that the United States mentioned in the body of that instrument are the United States of America.

If one of the jurors was asleep, the defendant should have called attention to the fact at the time. There is no suggestion that it is newly discovered, and I cannot now say that the defendant may not have thought his interests were promoted by the actual course of the trial in this respect. *Motions denied.*

H. L. HAZELTON v. L. VALENTINE.

JULY, 1868.

The freedom from arrest granted to bankrupts "during the pendency of the proceedings in bankruptcy" does not relieve them from arrests existing at the commencement of the proceedings.

Where a debtor, a citizen of Massachusetts, was arrested in New Brunswick on *mesne process*, and gave bail, and after judgment had been entered up against him, surrendered in exoneration of his bail and was imprisoned, and afterwards filed his petition in bankruptcy in Massachusetts, and still later was charged in execution in accordance with the laws of New Brunswick, which require that a debtor so surrendering shall be charged within three months thereafter; *Held*, that such charging in execution was not an arrest during the pendency of the proceedings in bankruptcy, but related back to the surrender.

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It seems, that where an arrest is made out of the jurisdiction of this court, both debtor and creditor being citizens of Massachusetts, and the debtor being in bankruptcy here, the circuit or district court might, in a proper case, enjoin the creditor from proceeding with his arrest.

PETITION in the nature of a bill in equity, supported by affidavits, by which it appeared that in July, 1866, the petitioner was arrested in St. Johns, New Brunswick, for a debt alleged to be due the respondent, both being then and now citizens of Massachusetts; that he gave special bail to the action, and that judgment was afterwards recovered against him for a very considerable sum, and a *capias* issued, on which the sheriff made due return, *non est inventus*; and that afterwards the petitioner went to St. Johns for the purpose of rendering himself or being rendered in discharge of his bail; which was done on the 22d February last, and he has been imprisoned there ever since. On the fourth day of March last, his petition in bankruptcy, which had been prepared before his departure from home, was duly filed in the district court for this district, and he was adjudged a bankrupt, and now asked that his creditor should be enjoined from longer detaining him in prison.

H. W. Paine, J. P. Converse, & E. A. Kelley, for the plaintiff.

T. H. Sweetser, for the defendant.

LOWELL, J., after saying that a court of equity which had jurisdiction of the subject-matter and of the parties, might enjoin a citizen of this commonwealth and district from doing unlawful acts out of the district; and that the debt for which the plaintiff was imprisoned was a judgment debt, from which his discharge in bankruptcy would release him, proceeded:—

The main question, however, is whether the arrest was made “during the pendency of the proceedings in bankruptcy,” for it is only to such arrests, even though the debt be dischargeable, that the bankrupt law addresses itself.¹ In dealing with this subject it differs both from the English and the Massachusetts law, on one or other of which it is said to have been mainly founded. The insolvent law of Massachusetts does not interfere with arrests at all before or after the proceedings, excepting to provide for the examination, &c., of an imprisoned debtor. The English law, on

¹ *Re W. A. Walker, supra, 222.*

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the other hand, from 5 Geo. II., ch. 30, to 12 & 13 Vict., ch. 106, had this provision: that if the bankrupt were not in prison or custody at the date of the adjudication, he should be free from arrest or imprisonment by any creditor during the time, &c. There were several decisions upon the construction of this statute; but they are not of much value to us, because the language of the statute is different. For instance, the bankrupt was not liable to arrest by any creditor, whether his debt were provable or not: *Darby v. Baughan*, 5 T. R. 209; but on the other hand, if he were already in custody at the time of the adjudication, he was not within the exemption at all, and further detainers might be lodged against him even by other creditors: *Ex parte Goldie*, 1 Meriv. 176. In both these respects our law is obviously different. By 12 & 13 Vict., ch. 106, § 112, when any bankrupt is in prison or custody for debt, excepting as excepted (which exceptions are, I suppose, of debts which would not be discharged), the court of bankruptcy may order his release either absolutely or on such conditions as it shall think fit, provided that such release shall in no wise affect the rights of the creditor, &c.

Our statute takes a middle course, and without interfering with existing arrests, forbids them on the part of certain creditors during the pending of the proceedings. Was this such an arrest? I am of opinion that it was not. The arrest was made on the writ, and the petitioner while out on bail was in the custody of his bail, and when he was rendered in their discharge, he was theoretically and actually in arrest, substantially to all intents and purposes, as if he had never been released on bail. It is shown to be a rule of court in New Brunswick that a defendant who is rendered in discharge of his bail after judgment must be charged in execution within three months after the render; this rule is not substantially different from that which prevails in England and in Massachusetts. In this case, an *alias* execution was duly taken out and lodged with the sheriff on the first day of May, 1868, which was after the adjudication of bankruptcy, and the argument is that the arrest was made on that day. This point is too nice. It makes no difference whether the defendant be so charged within one day or ninety, so it be within the three months. It then relates back to the day of the render, and he has been in lawful custody and arrest for debt during the

whole period. Under the English law that the bankrupt should be free from arrest, it was held that he might be surrendered by his bail, and the cases all assume that he might be thereupon charged in execution without either the surrender or the charge being deemed a new arrest: *Ex parte Gibbons*, 1 Atk. 238; *Payne v. Spencer*, 6 M. & S. 231; *Offley v. Dickens*, 6 M. & S. 348; *Crump v. Taylor*, 1 Price, 74. When we consider that by the same law a debtor who is at large on bail cannot be arrested by other creditors (*Ex parte Leigh*, 1 G. & J. 264), those cases are of some weight in the present inquiry. However, I do not rely very much upon the English cases for the reason already given.

It seems highly unjust that a debtor, whether bankrupt or about to become so, should be able to surrender himself, and discharge his bail, and become at once entitled to his release, to the detriment of the creditor. His arrest, if it be called so, is but the necessary and proper consequence and completion of his surrender, and without which it would not be a surrender. Suppose the petitioner to have applied for his release before he was charged in execution. Should he allege that he is under arrest for debt or not? Must he not, if he would aver the truth, say that he is imprisoned by virtue of an order of arrest on mesne process, by which the sheriff is entitled to hold him for a certain time after judgment or after surrender? If all this be true, and if the petitioner was lawfully in arrest when he filed his petition in bankruptcy, when did that arrest cease to be lawful? Was it at the very moment that it became useful to the creditor? The deputy-sheriff makes affidavit that he arrested the petitioner on the first of May, 1868, on an *alias* execution, &c., but it is no part of his duty as a witness to affirm to the law, and when we look at his return, a copy of which he annexes to his affidavit, we find it is in two words, — quite conformable to the fact, but not to his affidavit, — namely, “in custody.” Upon the petitioner’s argument, every bankrupt already under arrest on mesne process for a debt of the appropriate kind would be entitled to his discharge, because he must be charged in execution within a certain time after judgment, and if such charging is illegal, as being a new arrest, he might as well be released at once, to avoid vexatious and useless delay and imprisonment. I agree that the charging in execution is not only necessary to perfect the rights of the

creditor, but that it is at his election whether to cause it to be done or not; and if the debtor be discharged for want of it, the creditor does not lose his debt, but only certain important rights of future arrest, &c. But these may be often equivalent to a loss of the debt; and if they were not, I cannot say that the act of the creditor is in law or fact a new arrest during the pendency of the proceedings; it is but a lawful continuation of the old arrest, according to the terms and for the purposes for which it was originally made.

This view of the case renders it unnecessary to consider the other points raised. It may not be improper, however, to remark that I know of no reason why the petitioner may not proceed to obtain his discharge in bankruptcy, if he is entitled to receive it; for this does not require his personal presence in the district, that I am aware of; and if he does obtain it, there can be no great difficulty, I should suppose, in obtaining a release from imprisonment in New Brunswick upon this judgment.

Petition dismissed.

DISTRICT COURT.

THE OTTAWA.

JULY, 1868.

It is a general rule in salvage that all persons who give any personal assistance in saving the property are salvors. Another general rule is, that the ship, cargo, freight, &c., saved make one fund or subject of salvage.

Thus where A. discovered a wreck, and with two others whom he procured took active and successful measures towards saving the spars, tackle, and rigging, and several other persons afterwards exerted themselves in the same service, and these others on the next day went on board the disabled vessel, or on board the vessels which had come to her assistance, and did whatever was found necessary, the vessel being actually saved by a steamer, *held*, that A., who staid on shore the second day, could not be decreed a salvor of the tackle, spars, and rigging only, but was entitled to come in with the others against the common fund, he bringing into the fund the value of the spars, &c., which had been set apart for his benefit. The keeper of a light-house is under no obligation to render salvage services gratuitously.

A person whose oxen are used in a salvage service does not thereby become a salvor. Owners of vessels whose crews perform salvage service share the salvage compensation, not because their vessels are used, but as an encouragement to permit their use or the use of the men.

The Ottawa.

SAVAGE.—The brig *Ottawa* with a valuable cargo was anchored in a dangerous position, in Vineyard Sound, near the breakers at the island of Cuttyhunk, on the night of 7–8 April, 1868, and in a severe gale was partly dismasted, and was abandoned by her crew. S. A. Smith, keeper of the light-house on the island, discovered a part of her tackle and rigging floating near the shore, at about half-past six o'clock that night, and attempted to give notice to Captain Church, a man of skill and experience in such matters; but he was at home. He did notify two men, and with them made the brig fast to the shore, so that it could be afterwards saved. Later in the day several other inhabitants of Cuttyhunk gave assistance, by their labor, and that of Captain Church's oxen, the floating materials were all dragged on shore, and fully and finally saved. It was Wednesday; and the gale continued all that day. Two of the libellants went in a pilot-boat to New Bedford, and engaged a steamer, which tried in vain to reach the brig that day, but did so at an early hour on Thursday morning, when most of the libellants went on board either of the brig, the steamer, or pilot-boat; and the anchor was weighed, and the brig was towed safely to New Bedford, and repaired.

The tackle, spars, and rigging which had been saved from the wreck were stored in Captain Church's barn, and were by him offered to the agent of the underwriters, who paid him one-half of the value, namely, one hundred and fifty dollars. Captain Church rendered no personal services in saving any of the property.

Mr. Smith did not go on board the brig, or render any personal services after Wednesday.

All the persons engaged in the service, excepting Smith, filed a claim against the brig and her cargo, April 18, 1868, and the warranty was made returnable May 1. Before the return day, but after the claim had been made, the underwriters agreed with the libellants that five thousand five hundred dollars should be paid in full, with costs; but before the money was paid they were notified that Mr. Smith claimed to be a salvor. Thereupon the money was paid to the libellants' proctor, Mr. Crapo, upon the agreement that he should retain it until Mr. Smith's rights were ascertained and disposed of. The vessel and cargo had already been released, and the libel was dismissed by consent.

Some negotiations were had, but no result was reached; and

on the 18th of June the original libellants applied by petition to this court, reciting generally the above proceedings and agreements, and averring that Smith was not a salvor, and asking that he might be cited in to show cause why distribution should not be made among the original libellants, and that Mr. Crapo might be cited to show why he should not pay over the money. Upon the filing of this petition, the order dismissing the libel was rescinded by agreement of the libellants and the claimants, leaving open the question of amount of salvage as well as the distribution. On the 16th of July, which was a time agreed on by the parties, Smith appeared and filed a statement of his services in the form of an answer to the petition, and a hearing was had, at which it was agreed that the amount already paid was the just and true amount of salvage; and evidence and arguments were heard on the question whether Smith and Church were salvors.

T. M. Stetson, for Smith and Church.

W. W. Crapo, for the original libellants.

LOWELL, J. The amount of salvage has been agreed, and the particulars of the distribution are not submitted to me; but the questions which are submitted are questions of distribution. It is the general rule in salvage that all persons aiding in the service, however slightly, are salvors. The exceptions are when the services are insignificant and hardly amount to personal exertion, such as sending other men to work, and the like. This case appears to fall within the general rule. Mr. Smith performed some part of the work, and aided in giving the notice and information. Although he did not go off to the vessel on the second day, and gave no personal assistance in saving her, but only in the rescue of her tackle and apparel, yet the evidence shows clearly that many of those who did go from the shore, and who are properly joined in the libel, were not needed, and that several of them in fact performed no work at all, excepting such as Smith did in saving the materials. Indeed, there was little to be done by the men from Cuttyhunk on the second day, except to get up the anchor, and get out and make fast the tow-line.

The great merit of the salvage, so far as the inhabitants of the island are concerned, was in getting the news to the steamer promptly, and procuring her assistance. But only two of the salvors were actually engaged in this service.

The Ottawa.

There is some reason to suppose that the ill feeling may have arisen out of an attempt on the part of Smith to monopolize the benefits of the discovery he had made. If he made the attempt, it was not successful. The others aided during Wednesday, and his services during that day entitle him to be considered one of the salvors. The objection that he is in the employment of the government cannot avail. The vessel saved was not the property of the government; and no law or order has been shown requiring the keepers of light-houses to render gratuitous services beyond the line of their ordinary employment as such keepers. Such a law does apply under some circumstances to the officers and crews of our revenue-cutters, whose duty includes, by statute, certain services of this nature.

I find that the property saved was the vessel and her tackle; that the whole must be considered a common fund and a common service, and that the libellants are not justified in severing them and proceeding against the vessel alone, without mention of the articles belonging to her which were saved on and near the shore, and by that suppression making a libel which is substantially untrue. The money received for the tackle must be brought into the common fund, and Smith must be admitted as one of the salvors. I repeat that there is no question before me concerning the amounts which the several salvors shall have.

Captain Church, whose oxen were used, is entitled to a fair compensation for their use; but they cannot be salvors, nor make him one. Vessels are the only exception to the rule that the supply of tools or other things does not constitute their owner a salvor: *The Charlotte*, 3 W. Rob. 72; *The Vine*, 2 Hagg. 1. This exception stands on grounds of public policy; and the salvage compensation does not depend on any actual use of the vessel. It is a premium for permitting the service to be performed by the crew of the vessel, or by the vessel itself, as the case may be.

March v. Heaton & al.

GEORGE N. MARCH v. SAMUEL W. HEATON & AL.

OCTOBER, 1868.

A voluntary bankrupt is entrusted with the care of his estate before an assignee is chosen, as a sort of trustee. He has no right to buy of the marshal the stock of goods which the court has ordered to be sold as likely to deteriorate. Such a sale will be set aside on complaint by the assignee without proof that the price was inadequate, or that there was any fraud in fact intended.

BILL IN EQUITY to set aside the sale of a stock of goods. The bankrupts applied for the benefit of the act in the month of August, and there was some delay in the appointment of an assignee. In the mean time certain creditors petitioned the court to order the stock of goods to be sold, on the ground that they were liable to deteriorate and depreciate. An order was passed authorizing the marshal to sell the goods at a price to be ascertained by the appraisement of three disinterested persons. The marshal made sale of the goods at the precise sum at which they were valued, though he was told that another purchaser would give more. They were bought by Heaton, one of the bankrupts for the account of a friend of his, one Hubbard of Pittsburg and Heaton had ever since remained in possession of the goods as agent of Hubbard, and was selling them out in the usual course of business. The bill alleged fraud in the appraisement and in the purchase. A hearing was had on the application for a preliminary injunction.

B. F. Brooks & G. Z. Adams, for the complainants.

A. W. Boardman, for the defendants.

LOWELL, J. In the view I take of this case it will not be necessary to consider the affidavits bearing upon fraud in fact, though I ought to say that I do not find that the bankrupt Heaton, or any one else, intended any wrong. Still I cannot but see that Heaton misunderstood entirely his position and duties. The statute has seen fit to entrust the bankrupt himself in voluntary cases with the care and custody of his estate until an assignee is appointed. It guards the rights of creditors by making it a crime punishable by imprisonment, with or without hard labor as the court may adjudge, for the bankrupt to withhold any property from his as-

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signee, or to destroy or mutilate any book, deed, or writing relating thereto; and by refusing his discharge if he shall be negligent in the care and custody of his estate and in delivering it to his assignee. All this may be said to be, and doubtless is, less efficient than the simple rule which obtains in proceedings *in invitum*, giving the marshal as messenger custody of these effects from the moment of adjudication. There appears to be no solid reason for this difference, unless we can safely assume that all voluntary bankrupts are to be trusted with property in which they no longer have any personal interest.

Be this as it may, voluntary bankrupts are bound to take every care of their assets for the benefit of their creditors. They are the assignees until the creditors have chosen others; and I hold it to be as illegal for a bankrupt to purchase his own stock in trade before he has an assignee to deal with, as it would be for the assignee to do so afterwards. Now, in this case, it seems to be made out by the evidence that the petition to sell and all the proceedings were arranged by and for the benefit of Mr. Heaton. It was he who discovered the importance of an immediate sale and pressed it to a conclusion, and became the purchaser for a friend who was willing to advance him the money. I must assume him to be the owner subject to repayment of his friend's advances.

The careful and experienced deputy of the marshal misunderstood my order, which, of course, intended the appraisement to establish a *minimum* and not a *maximum* price; and the defendants, by means of this mistake, may probably have got the goods for somewhat less than another purchaser was willing to give. But I do not rely upon that. My judgment is placed upon the simple ground that the bankrupt had no right to buy, and that the assignee has a right to overrule the sale. Whether he will succeed in getting more for the goods is no part of the question for me; that was for him to consider before he brought his bill. I shall not enter upon that inquiry.

Injunction ordered.

The Siren.

THE SIREN.

1868.

The prize act of 1864 does not exhaust the subject of prize or no prize. There may still be captures which go to the United States only and not to the captors, and there may be prize without captors.

On the day that Charleston surrendered to our joint forces, but after the surrender, a commissioned cruiser found and took possession of an abandoned merchant vessel, and saved her from imminent loss by fire: *held*, that neither that cruiser nor the fleet generally were captors, but that the vessel was prize to the United States.

The surrender of Charleston operated the capture of all the prize or booty in the town and harbor.

Salvage was decreed to the finders of the prize, for putting out the fire.

PRIZE. — On the 18th of February, 1865, at noon after Charleston had surrendered to the United States forces, the *Gladiolus*, a steam-tug commissioned as part of our fleet, discovered the *Siren*, which was a blockade-runner, on fire in the Ashley river, about one hundred yards below the first bridge. She was unarmed, had been abandoned, and set on fire, and her pipes cut. At the same time that the boat from the *Gladiolus* came near the prize, a boat from the *Commodore McDonough*, another naval vessel, undertook to board her, but turned back on finding that the *Gladiolus* was nearer. The whole fleet was then under way, moving up the harbor, and many vessels were within signal distance of the prize at the time of the capture. About ten or a dozen colored men, civilians, in Charleston, assisted with buckets in putting out the fire.

LOWELL, J. The rebel army evacuated the forts in the harbor of Charleston and the town itself, on the night of February 17, 1865, and on the next morning our fleet and army took possession. Who first raised the flag of the United States within the town, and at what precise time, does not distinctly appear in evidence; but whatever was done was by consent of the citizens, represented by their municipal officers, though certainly that consent was not very important in a military point of view. At about eleven o'clock in the forenoon the steam-tug *Gladiolus*, a commissioned vessel of the navy, was proceeding up the harbor,

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and her officers were informed that a steamer was lying near one of the bridges abandoned; they went to her at once and found the blockade-runner, Siren, on fire, with her steam pipes cut, so that she was in great danger of instant destruction. A boat from the Commodore McDonough, another naval vessel, had been making for the Siren, but turned back on learning that the steam-tug was bound on the same errand and would arrive sooner. The officers and crew of the tug put out the fire and turned the Siren down the harbor towards the fleet, where, with the aid of some persons from other cruisers, the vessel was kept afloat, and so far repaired as to be navigable. The Siren has been condemned as prize and sold, and the questions left for decision relate to the distribution of the proceeds.

The prize act of 1864, chapter 174, 10 Stats. 306, treats the subject chiefly as it concerns naval captors, and does not profess to deal with the subject of prize generally and fully. It cannot be doubted that there may be a seizing or taking *jure belli* of enemy property within the ebb and flow of the tide which is neither by public nor private armed ships, as, for instance, by a direct surrender to civil officers, &c. The celebrated order in council in England, passed March 6, 1665-66, reported, among other places, in Hay & Marriott R., p. 50, which declares the rights of the lord high admiral, mentions many instances of prize which are *droits* of the admiralty, such as "enemy's ships and goods casually met at sea and seized by any vessel not commissioned," &c. Now, in England, during the colonial period, these several *droits* of the admiralty were not prize to the captors, because the king's several grants to the takers of prizes were made in each war as the occasion arose, and were subsequent in date to the general grant to the lord high admiral. So that the English cases are very numerous in which prizes are condemned to the admiral, or, in later times, to the king in his office of lord high admiral, and not to the captors. It may well be conceded that the United States have succeeded to the rights in prize, both of the crown and of the lord high admiral, and that congress has the right to grant prize-money to whomsoever it pleases, without regard to these ancient distinctions. Still, in construing the prize acts, it is useful to recollect that by the English law the grants of prize-money had their well understood

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limitations, and that a condemnation in prize was not necessarily a condemnation to captors; and that there were prizes which were not granted to either the admiral or the captors, such as vessels voluntarily brought in on revolt by their own crews, and vessels seized in port before declaration of hostilities; so that there were three different kinds of condemnation,—to the king, to the admiral, and to the captors. I have no doubt that some of the same distinctions and limitations hold good in this country to-day. Whatever is prize of war by international law in the several countries which acknowledge that law, is so here, and our prize acts do not undertake to limit or define the boundaries of prize or of prize jurisdiction. Accordingly, I have held, in a case of cotton picked up at sea, that it was properly proceeded against as prize, and I have no doubt of the propriety of that decision.¹ It necessarily follows that there may be prize when there is no one who is a captor under the prize act. Thus, if a person or a vessel having no existing commission makes a prize, the condemnation goes to the United States: *The Dos Hermanos*, 10 Wheat. 306. So if there be no captor at all, as of vessels voluntarily brought into port by their crews, or driven in by stress of weather. The old grant of *droits* of the admiralty was of prizes of this character, but it did not include all of this kind; the distinction, therefore, is older than the grant of *droits*, and the principle remains good in our law, that there may be seizers or takers in a certain sense who are not entitled to prize-money as technical captors, though the goods seized may be prize.

Upon the best consideration I have been able to give the subject, my opinion is that the *Gladiolus* was not the captor of this prize within the true intent of our statute, nor was the fleet as a whole.

All seizures of this character are made for the benefit of the government, in the first instance, and are under its control, and the captors have no vested rights until after a decree has been rendered, even if they have any before actual distribution made. This is a well-settled doctrine in prize law, and is necessary to the freedom of action of the government in its dealings with neutral nations. One consequence of this general rule is that grants of

¹ Seventy-eight Bales of Cotton, *supra*, 11.

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prize-money are to be construed strictly, and the burden is on the grantee to bring his case within the grant. Our prize act is the grant; for, though not exhaustive of the subject of prize or no prize, it is exhaustive of the subject of distribution. The prize act relates to captures by commissioned vessels. It does not in terms deal with captures by the army and navy jointly, nor with several other classes of entirely legitimate takings. The law of England was established by a decision of the lords of appeal, as long ago as 1785, that capture by conjoint expeditions of land and sea forces were not distributable in the admiralty to the naval part of the captors, and, therefore, not distributable at all: *The Hoogs-karpel*, cited 2 Dods. 446; and the former practice of giving a proportion to the navy, upon some notion of an equitable division, was declared to be unsound.

This matter was soon afterwards and is still regulated by acts of parliament, but those acts do not set aside the principle of the decision, but provide with care for the proper distribution of the prize-money to the army and navy in a manner calculated to do justice to both, and not merely to the navy alone. The principle on which the original decision was made is applicable to this case. Here a fortified town, besieged by land and sea, is evacuated by the enemy, and surrendered by the civil authorities. The evacuation may be presumed to be caused by the pressure of both the naval and the military forces. If the fact were carefully examined, it might appear that the reasons for the abandonment were rather military than naval, but that is not important. It is fair to assume that they were both.

Now, in equity, the capture of all the property thus abandoned and surrendered must be credited to both army and navy; but as this court has not been invested with power to deal with such captures in the way of distribution, the remedy must be sought from congress. It is said that there were several war vessels of the rebels in the harbor, which were found and sent home, and which the navy department at first declared its intention of bringing before a prize court, but that this purpose was abandoned, and the vessels have been taken by the government without any adjudication. This seems to show that the department considered that a different course was proper to be pursued with vessels of war and

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mere merchant ships, or else that after the Siren was sent in, it reconsidered its action, and assumed that the court would necessarily condemn for the benefit of the United States only. If the latter was the view, I consider the principle to be sound, though the practice may be of doubtful propriety. If either an international question or one of salvage could arise, it would have been not only fitting, but necessary for the due ordering of the matter and its final adjustment, that a prize court should pass upon it. But the assumption was right that the property which, whether afloat or on shore, was liable to seizure, and was in fact abandoned and surrendered, was in law captured at the moment of the capture or surrender of the town, and that the chance finder of such property within the abandoned lines, whether a commissioned officer or not, and whether belonging to one or the other service, was bound to seize for the government, and not for himself. The argument was pressed with much force, that all the fleet must share in such a prize as this, because there was no actual chase or capture by the Gladiolus, but a virtual taking by the whole. I admit the argument, but give it a wider application, and say there was a virtual surrender to the United States forces generally, and the army as well as the fleet are captors. If a file of soldiers had happened to go on board first, the right of the fleet would have been no greater or less than it now is. But, as the prize act does not meet such a case, I am obliged to say that the remedy must be sought elsewhere. It is undoubtedly true, that if the navy had not been present, this prize might have escaped to sea; but if the army had not been present the town might not have been surrendered when it was surrendered, and if not, the capture might equally have failed.

In the case of the cotton found floating at sea, I not only condemned the proceeds as prize, but as prize to the captors. This I did on the ground that we have applied the principle of *droits* of the admiralty only so far as reason and justice require, and that the grant of our prize act may well extend to any taking at sea by a commissioned cruiser, whether there be any resistance or not. The point argued in that case was, whether the goods were prize at all, or were derelict. I had no doubt they were both. Whether they were prize to the captor was not argued inde-

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pendently of the main question of prize or no prize, and I did not think it very important, because, under the circumstances of that case, I should probably have had no difficulty in giving as salvage the moiety which the act grants as prize-money, and so it was merely a question of the form of the decree. But the distinction between that case and this is, that there the taking was clearly and only effected by the commissioned cruiser, and there was no evidence how, when, or why the goods had been abandoned, but only that they were enemies' property, while here we know or must presume that the abandonment was caused by the presence of the joint forces, and the capture may fairly be said to have been complete before the tug came up. If a commissioned ship had come into the port that night and found one of these abandoned vessels in a corner of the harbor out of signal distance of any of the fleet, it would shock our sense of justice to say that the prize should be condemned to that vessel as sole captor; but the only grounds on which the fleet can claim here are either that the tug was sole captor by virtue of such a casual finding, and that the others were in signal distance, or else that there was a constructive capture by the whole fleet. If a constructive capture, it was by army and fleet. We cannot resort to constructive capture to let in the whole fleet, and to actual capture at the same time to shut out the army.

The *Gladiolus* herself stands differently. By the elastic practice in prize, a vessel failing in a demand for prize-money may be admitted to receive salvage. Theoretically this reward is given for the preservation and care of the property, and not for its capture, though, in fact, in most cases, the meritorious service is chiefly in the capture. But in the present case there were services of a strictly salvage character, by which the prize was saved from imminent danger of great damage or destruction.

But as this point has not been argued, and as there may be questions upon which the several parties may desire to be heard, not only as to *quantum*, but even the general question of whether these naval persons can be salvors, in such a case, I will hear counsel upon this at an early day, if requested.

NOTE. — At a subsequent day the court awarded salvage to the *Gladiolus*.

The Olive Branch.

C. Cowley, Lothrop & Bishop, C. W. Tuttle, S. B. Allen, J. P. Woodbury, C. L. Woodbury, for the several vessels of the fleet.

R. H. Dana, Jr., district attorney, submitted the case without argument.

Affirmed by the supreme court, December term, 1871.

THE OLIVE BRANCH.

NOVEMBER, 1868.

The crew can be salvors of their own vessel when their contract has been put an end to, either voluntarily by the master, or as the effect of a *vis major*.

But where the crew were abandoned by the master, near the home port, and the vessel was soon afterwards stranded, and there was no mate, and the men got the ship off the shore and saved her with considerable difficulty and danger, *held*, they were not salvors.

A local usage to require the men to stay by a fishing vessel till she is unloaded and cleaned, in her turn, will not authorize the owners to claim a deduction from the wages of the men who have not assisted in this work, if they were not asked to stay for this purpose, and the custom was merely made use of to cheapen their demand for wages.

Quære, if a usage to wait for an indefinite time until the owners are ready to discharge the vessel is valid?

FIVE seamen of this schooner proceeded for their wages and for salvage. Their contract was to carry on the bank and other cod fishery from Plymouth during the season, and to make two trips, if the owners should wish to make so many, for round sums of money for the season.

The schooner was a large one, and her first trip lasted until the early part of September. The master on his return anchored the vessel near Yarmouth, some twenty miles from Plymouth, and left the vessel towards night, taking with him the two sharemen; and it was admitted that he did so without right, and in pursuance of a purpose to defraud the owners, some of whose property he had embezzled. A storm was even then rising, and in the course of the night the vessel was stranded. The libellants stayed by the schooner, and on the next day, with much labor and danger, and some privation, succeeded in getting her afloat, and

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pumped out in Yarmouth harbor. They were without officers, for no mate had been connected with the schooner. They telegraphed to the owners at Plymouth, and a man was sent who took command, and the vessel was taken safely to Plymouth and anchored near the claimants' wharf on Sunday. The libellants asked for their wages more than once; and on Wednesday or Thursday the owners offered to pay them if they would deduct ten dollars each, which they refused. Some of them afterwards offered to take off five dollars, but this offer was not accepted.

The owners testified to a custom at Plymouth, for all seamen of fishing vessels who do not expressly stipulate to the contrary, to stay by the vessel until the fish are washed and the vessel fully discharged and cleaned, and that if the same owners have other vessels which are being discharged, the regular turn must be taken for the vessel in question. That in this case there were one or more vessels of theirs which had priority, and that some time would elapse before the Olive Branch could be unloaded. By way of set-off for this remaining duty the owners asked for this reduction. The libellants demanded not only full wages but salvage.

C. G. Thomas, for the libellants.

W. D. A. Whitman, for the claimants.

LOWELL, J. Seamen may be salvors of their own ship when their contract has been dissolved, either voluntarily by the master or by the effect of a *vis major*: *The Blaireau*, 2 Cranch, 240; *The Triumph*, 1 Sprague, 428; *The Florence*, 16 Jur. 572; *The Warrior*, Lush. 476. That this point may be one of some nicety, will be seen by comparing the case of *The Triumph*, *ubi supra*, with that of *The John Perkins*, 21 Law Reporter, 87. In this case I am obliged to say that the conduct of the libellants, courageous and meritorious as it was, does not bring them within the law of salvage, because their voyage was not ended, nor their contract in any way annulled or dissolved. The master had left them, and it happened, from the nature of the voyage, that they had no mate; but the desertion had no reference to the approaching storm, and I regret to say that I cannot distinguish the case from one in which the master should have lawfully gone on shore, leaving these men in charge, or should have been lost overboard. I do not, of course, mean to be understood that where a ship at sea is deprived of her

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officers, and the men, or some of them, are competent to navigate the ship, and do supply the place of officers, they would not be entitled to extra compensation, but it would probably not be a salvage reward, and the evidence here does not enable me to ascertain any such service. Whether the action of the owners has been either generous or even gracious, I have no jurisdiction to determine.

Upon the question of wages, it appears that the owners did not desire to make a second trip, though perhaps the season was not so far advanced that they might not have required the men to go again under their contract: the dispute is upon the alleged usage. The libellants were shipped at Boston, and some of them had sailed but seldom from Plymouth or its neighborhood. They deny knowledge of the custom set up, and say that so far as they know, the usage is to wash the fish only when that service is expressly mentioned in the articles. The claimants are likely to be better informed on this subject, and the preponderance of the evidence is that such a usage exists. It is analogous to the general rule applicable to other voyages, unless when varied by contract or usage, that the seamen are to stay by the vessel until the cargo is unladen.

But it is clear that, in this case, it was for the interest of both parties that the men should be discharged when they were discharged. The vessel would not be unloaded and cleaned for an indefinite period, has not in fact been cleaned yet, some six weeks after her arrival; the board of the men would have come to much more than their services would be worth. One of the owners said very frankly that he considered it for the benefit of both parties that the men should be discharged on the Thursday, but that it was usual for them to make a discount when that was done, and this voyage having turned out ill, the saving was of some importance to the owners. It does not appear that the owner asked the men to stay; but, on the contrary, they were quite ready to have them go, upon terms. They told them why they asked the discount, but beyond that made no claim, but rather encouraged the belief that they would settle with the men. I cannot regard this conduct as quite ingenuous. The men may have been deceived by it, and have understood, as the fair result of the interviews, that there was no question at all of their

The El Dorado.

staying, but only upon what terms they would go. I so understand the matter myself as developed by the evidence. Under these circumstances equity requires me to regard the contract as ended by the consent of both parties; and as the owners have made no loss by its termination, I shall make no deduction from the wages. It is well understood that after a voyage is ended no statute desertion can take place; but a refusal of duty even then may lead to a diminution of wages by way of penalty; but the facts do not authorize the imposition of a penalty here.

It may be doubted whether a usage to detain the crew for an indefinite time, in the discretion of the owners, would be valid.

Decree for full wages.

THE EL DORADO.

NOVEMBER, 1868.

Where the first mate had been drunk two or three times on board the ship, and on the day the vessel was to go from London to Gravesend in his charge to begin her homeward voyage, got drunk and did not join her till the evening after she had arrived at Gravesend, the master was justified in discharging him.

But the master, having lawfully discharged the mate, was not justified in sending him on shore at night, with no responsible companion, when he was incapable of taking care of himself, if there was ample time to dismiss him in the morning; and must account for the mate's clothes that were lost thereby.

LIBEL FOR WAGES AND LOSS OF CLOTHES. — The case was tried in a summary way with no formal pleadings excepting the libel and claim, on the oral evidence of the libellant, and the affidavits of the master and second mate. The evidence tended to show that the libellant had been a master of a vessel, but that his habits were not good and he had lost that position, and was taken as first officer on this voyage by a master who was his townsman, as a matter of friendship; and the relations of the parties were always harmonious. The libellant had been drunk on board the ship more than once, and on the day the ship was to go from London to Gravesend under his charge, though with a pilot to direct the navigation, he went on shore to go to the post-office, and did not

The Richard R. Higgins.

appear again until the ship was at Gravesend, though the pilot had waited some hours for him. When he did come on board he was very drunk, and the master dismissed him and sent him on shore.

C. G. Thomas, for the libellant.

Mr. Hunter (agent of the owners), for the claimants.

LOWELL, J. Courts of admiralty are not very severe with seamen who happen to get drunk once or twice, especially if they are off duty. But the first officer has a much higher responsibility than the crew, and must be proportionally careful in his conduct; and if he fails when left in command of the ship, the master is justified in visiting such an offence with a severe punishment. In this case, to discharge the libellant at a port where he could readily obtain employment, or a passage home, does not seem to me too harsh. The wages were paid in full, and no damages for the dismissal are to be recovered.

I hold the master to be wrong in sending the mate on shore at night in a condition in which he was wholly incapable of taking care of himself; for he was quiet, or at least was fully under control and could have been kept in his room, and the vessel was not to sail until the tide should serve in the morning. A master must exercise self-control and even forbearance, and must punish his men in a mode which will work them no unnecessary injury. So far as the clothes are concerned I consider him to have acted at his peril.

Decree accordingly.

THE RICHARD R. HIGGINS.

NOVEMBER, 1868.

A schooner with the wind aft was crossing the course of a schooner close-hauled on the port tack, and undertook to go astern of her; at the same time the close-hauled vessel came about, and a collision ensued. *Held*, that the close-hauled vessel was in fault for not keeping her course.

To relieve a vessel from fault in changing her course when the rule requires her to keep it, she must show clearly that it was done after a collision had become inevitable, or at least after a courageous and skilful navigator would have thought it so.

COLLISION.—The libellant's case was that his schooner, the *Emma Bacon*, was on a voyage from Philadelphia to Boston, with

The Richard R. Higgins.

a full cargo of coal, and between one and two o'clock at night, on the 3d of June, 1867, had arrived at a point about two miles to the northward and eastward of the Pollock Rip light-ship, when a red light was discovered about one and a half points on the starboard bow; that the master and two mates were on deck, besides one or more men forward on the lookout, the first mate being at the wheel. The Emma Bacon was nearly dead before the wind, and the light was discovered at a distance estimated to be from one-half to three-quarters of a mile; the master took his night-glasses, and made out a schooner, which proved to be the Richard R. Higgins, standing in towards the land, close-hauled on the port tack; he ordered the mate to go astern of her, who thereupon put his helm to port, and brought the vessel up about two points,—enough in the opinion of the witnesses to clear the other schooner. They presently found that the latter was tacking, and then put their helm hard aport, and brought their vessel round so that her sails shook; but the schooners came together at the bows, and each sustained considerable damage.

The evidence for the claimants did not vary this case, excepting as to the time when the several changes of course took place. It tended to show that the master of the Richard R. Higgins was on the lookout, and saw the green light of a vessel about one and one-half points on the port bow, which he rightly interpreted to mean that a vessel was crossing his course. He thought the distance to be from three-quarters of a mile to a mile, and he held his course until he became convinced that there was danger of collision; and then, as the other vessel did not show any signs of changing her course, he gave the order to go about. As his vessel got into the wind, he found that the Emma Bacon had changed her course, and he then hailed her to keep off; but she continued under her port helm notwithstanding, and the collision occurred.

LOWELL, J. There can be no doubt that it was the duty of the libellant's vessel with the wind aft, to avoid the close-hauled vessel; and that it was equally the duty of the latter to keep her course; and as she did not keep it, the only question is whether there was any thing in the circumstances which justified her departure from the usual rule. When a collision has become inevitable, it is the privilege of the ship which has the right of way to take any measure

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which may tend to lessen the force of the shock ; nay more, it has sometimes been conceded to the infirmity of human nature that when the vessel that has the burden of avoiding the danger has come so near that to a reasonably firm and skilful navigator it appears that the collision is unavoidable, it shall be taken to have been so ; and a mistake caused by the rashness of the other party shall not be imputed as a fault to him who has committed it. But this excuse must be made out clearly and satisfactorily, or the rules of navigation will become useless.

This is not such a case. The whole evidence, and indeed the candid statement of the master of the respondents' vessel by itself, tends to show that he did not wait long enough. He appears to have thought that the duty of changing devolved upon the person who first discovered the necessity for a change. It seems altogether probable that the change of course was made by each vessel at about the same time ; and that this was in ample season to avoid the danger, if only one had made the change, is shown by the fact that both vessels had come entirely round before they struck ; and by the opinion of some of the respondents' witnesses that even after their schooner had come into the wind, it was not too late for the Emma Bacon to have cleared her by starboarding her helm instead of keeping it to port. If they were within hailing distance before the change, that would have been the appropriate time to hail ; but probably they were not so, and if not, they moved too soon.

There is another consideration, which, as it involves a point of nautical skill, I do not advance with so much confidence. It appears to me that the most proper course for the Emma Bacon was to go astern of the Higgins, as she undertook to do. If so, the master of the latter vessel in a doubtful case ought to have taken measures, if he took any, to co-operate in that movement, else he might be increasing the danger which he tried to avoid, as proved to be the case here.

For these reasons I hold that the agents of the respondents failed to perform their duty, and there must be a

Decree for the libellant.

J. C. Dodge, for the libellant.

H. W. Paine & R. D. Smith, for the claimants.

Re Worthington S. Locke.

Re WORTHINGTON S. LOCKE.

DECEMBER, 1868.

It seems, that under the bankrupt act an insolvent debtor may make an illegal preference though he does not contemplate bankruptcy. The question is of intent to give one creditor an advantage over the others.

This is a question of fact which is not conclusively decided by showing a known insolvency, though it may be inferred from such insolvency in the absence of controlling evidence.

A fraudulent preference which will prevent a discharge of the bankrupt, under § 29 is defined in that section and in § 85, without reference to § 89.

One who had ceased to be a trader and had disposed of all his property many years before the bankrupt act was passed, but had not settled all his trade debts, and was living on his salary as a clerk, paid his rent and some other necessary expenses monthly, without intending to become bankrupt; *held*, that such payments were not fraudulent preferences within § 29, of which his trade creditors could take advantage in opposing his discharge, though made within four months before bankruptcy, and when the debtor knew he was insolvent.

OBJECTIONS to the bankrupt's discharge heard by the court. The examination of the bankrupt, which was the only evidence in the case, tended to show that he had been extensively engaged in trade down to the year 1857, when he failed and settled with many of his creditors. Others, including the two who proved their debts here and opposed his discharge, had obtained judgments which were still valid. Since 1857 Locke had not been a trader, but had earned money by service in the army and as a clerk. The specifications set up certain payments made by him from time to time, within four months before filing his petition, for rent and other necessities. Locke admitted that he was insolvent when he made those payments and for ten years before, but denied any intent to prefer those creditors and any contemplation of bankruptcy.

J. D. Ball, for the creditors.

J. S. Abbott, for the bankrupt.

LOWELL, J. In its origin the doctrine of preference is a creation of the courts. The word is not found in the English statutes; but the courts soon discovered that many acts, legitimate at common law, would tend to defeat the equal and proper operation of the bankrupt laws, and declared such acts to be frauds on the statute. Thus the conveyance of the whole of a trader's

property with a view to the payment or security of past debts, has always been held a fraud on the act, although there may have been no wrong intended. I had occasion to examine these decisions on a former occasion, and to show that they rest in principle on the doctrine of preference. The English courts hold that such a conveyance is conclusive evidence of insolvency, and *ipso facto* a fraud on the law. But they have taken an entirely different view of assignments of only a part of the property, and especially of payments made by a trader in the course of his business, or on suit brought, or even on demand made by the creditor; and the rule in those cases is, that a payment to be an act of bankruptcy must be voluntary, that is, without pressure or demand, and in contemplation of bankruptcy; for they will not admit any inference of an intent to give an advantage to a creditor who is merely pursuing his own rights; nor that a debtor who really hopes to keep up his business, and goes on paying in that hope, can fairly be said to intend to prefer one, when he really intends to pay all. It is a question for the jury in each case whether the payment was made without a demand, and with the prohibited intent: *Fidgeon v. Sharpe*, 5 Taunt. 541; *Morgan v. Brundrett*, 5 B. & Ad. 289; though the court or jury may infer the intent from the insolvency of the trader: *Ex parte Simpson*, De Gex, 9.

Under the bankrupt act of 1841, the preferences declared void by the second section were such as were made by one who at the time contemplated becoming a bankrupt under the act: *Buckingham v. McLean*, 13 How. 150.

In our existing bankrupt law preferences are spoken of in three different sections, viz., 29, 35, and 39. The first-named section treats of the debtor's discharge, and what fraud or misconduct shall prevent or avoid it; the second, of frauds which the assignee may avoid; and the third, of acts of bankruptcy for which a warrant may issue on the petition of creditors.

It is argued that under § 39 neither contemplation of becoming a bankrupt under the act nor a voluntary payment need be shown to create a preference which shall be an act of bankruptcy, and that § 29 avoids a discharge for every thing which by § 39 is an act of bankruptcy. On the first point, I agree with the argument. The later statutes of Massachusetts, which our law appears to have

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followed very closely in this particular, have been construed to mean that the payment or conveyance need not be made in contemplation of becoming an insolvent under the act: *Ex parte Jordan*, 9 Met. 292; *Holbrook v. Jackson*, 7 Cush. 136; *Williams v. Coggeshall*, 8 Cush. 377. And such is the true construction of the bankrupt act; for without it, the reference to insolvency as well as bankruptcy in sections thirty-five and thirty-nine would be without meaning. If, then, a debtor is insolvent, and knows himself to be so, and pays one creditor in full with intent to give him an advantage over the body of creditors, that is an act of bankruptcy. Nor does pressure by the creditor relieve the act of its character as a preference. The statute is silent on this; and in point of fact, such a proceeding has a no less injurious effect on the other creditors that it may have been solicited by the particular creditor; and so I have often ruled. See *Denny v. Dana*, 2 Cush. 160. But on the other hand, I am not prepared to say that the mere payment of a debt by a debtor who is insolvent and knows it, is always and necessarily an act of bankruptcy. Upon this point I give no opinion. Such a rule is open to the same objection with the one just considered, namely, that it substitutes an inflexible rule of law for an inference which is properly one of fact. That every person must be presumed to contemplate the necessary consequences of his act is true; but when we come to consequences that are only more or less probable, it is fit that the jury should say whether they were in the mind of the party or not. No doubt in the absence of controlling evidence they may decide by the act itself; but the intent to prefer must include, I think, the intent, or at least the fear, of stopping payment, which idea is not necessarily included in insolvency. Besides I am much inclined to think that § 29 does not, in this respect, adopt the provisions of § 39. The latter section is remedial, and should be construed broadly in favor of creditors; because its scope and purpose are to oblige insolvent traders to take advantage of the act, and thus to ensure an equal distribution of their estate under its carefully framed provisions. Accordingly, we find that many acts, which are innocent in themselves, are made grounds for a petition *in invitum*. Such are, lying in prison for seven days, allowing commercial paper to be dishonored, &c. All of these may, without impropriety, be called frauds on the bank-

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rupt act. But section twenty-nine is intended for the benefit of honest and careful traders. It sternly prohibits both fraud and negligence. Not keeping proper books of account, wasting money by gaming, not keeping the estate for the assignee after the petition has been filed, and many other acts of omission and commission are grounds for withholding the certificate, though several of them are not acts of bankruptcy. But in dealing with preferences its language is peculiar. It first enacts that the discharge shall be refused if the debtor has given any fraudulent preference contrary to the provisions of the act; it then, in the same sentence defines a preference thus: "Or, if he has, in contemplation of becoming a bankrupt, made any pledge, payment, &c., for the purpose of preferring any creditor," &c. And finally, if he has been guilty of any fraud whatever contrary to the true intent of this act. Considering the intent of this section to repress fraud and negligence, and the full description of the various acts which may be relied on in bar of the certificate, I am not prepared to say that the general words refer to the merely technical frauds created by the thirty-ninth section. They may, no doubt, include all frauds in fact, whether specifically defined in any part of the statute or not, but hardly to mere acts of bankruptcy as such.

I am further of opinion that the payments which this debtor made are not within any true definition of a fraudulent preference. It is very rarely that the payment of rent,¹ or of a butcher's or grocer's bill, in the ordinary course of dealing, can be a preference, because the consideration is a continuing one. If the tenant does not pay his rent, he is ejected, and the main consideration is the forbearance; and so of the other like bills, though in a less degree. We have seen that a debtor cannot be said to intend a preference, unless he expects or fears either to stop payment or to become bankrupt. The evidence shows that this defendant did not contemplate bankruptcy. He had, indeed, years before stopped payment, and ceased to be a trader, and had disposed of his trade capital by what may or may not have been preferences by the law of his domicile. But he had accumulated no new estate, and the payments which are now objected to were for his current expenses, and made out of his current earnings, though they were made monthly

¹ I have ruled this in several cases. — J. L.

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and not day by day. If these were technical preferences under § 39, which I doubt in the case of one not a trader, and not paying one trade creditor before another, yet I cannot believe they were fraudulent preferences within § 29, which should bar his discharge.

Discharge granted.

THOMAS ROGERS & AL. v. WILLIAM G. LEWIS & AL.

DECEMBER, 1868.

Where seamen were shipped in Boston for a voyage "to port or ports in Hayti one or more times, or other West India ports, and back to port or ports in the United States on this or any other vessel, term not to exceed six months," and went to Port au Prince in Hayti, where they were boarded on shore at the owner's expense, and then brought to Boston on another vessel, and their wages and all expenses were paid to the date of their return, for which they gave a receipt in full; *Held*, they were not entitled to two months' extra wages, as having been discharged abroad; for the discharge was at home.

It is too late after the contract has been fully and voluntarily performed, for the seamen to object that they might have refused to perform it.

The seamen received all that would usually be due, even for an illegal discharge; namely, their expenses and wages to the home port.

WAGES. — The libellants were shipped at Boston in September last, on board the American steamer *Maratanza*, and signed articles which contained the following description of the voyage: "From the port of Boston to port or ports in Hayti one or more times, or other West India ports, and back to port or ports in the United States on this or any other vessel, term not to exceed six months." The reason for this peculiar contract was that the steamer had been sold by the respondents, her American owners, to the Haytian government, and it was supposed that she would not return to the United States, which proved to be the fact. Soon after the arrival of the libellants in Port au Prince, they were sent on shore and boarded there for some weeks at the owner's expense, and then brought home in another vessel, and their wages and all expenses were paid them to the time of their arrival at Boston, and they thereupon gave a receipt in full of all demands.

C. G. Thomas, for the libellants.

I. W. Richardson, for the respondents.

LOWELL, J. It is contended by the libellants that they were discharged in a foreign country, and so are entitled to two months' extra wages, as provided by the statutes of 28th February, 1803, § 3; 20th July, 1840, and 18th August, 1856. These laws are intended to secure to mariners whose contract is unexpectedly terminated, a fixed compensation, in whatever part of the world they may be, as an indemnity for their disappointment. It is a conventional sum, which may be much more or much less than an actual indemnity. Whether they may in any and what cases agree to forego this payment, is not a question which arises in this case. For I hold with the counsel for the respondents that these men were not discharged in a foreign country within the meaning of the law. It does not appear that they either demanded or received any discharge from their contract; they rather acquiesced in its being carried out according to the construction put upon it by the master. Having received pay for the whole time of their service, and for a much longer period, namely, to the time of their return home, and all their expenses, they have had all that in an ordinary case they could recover if they had been wrongly discharged abroad, and it would be an anomaly if they could recover more than this when they have been dealt with in all fairness, and according to their contract. It does not appear by the evidence that any of the libellants would have been benefited by receiving two months' wages at Hayti instead of the sums which they have received. Nine of them have had one month's pay besides their expenses; and the evidence does not show whether the expenses here equalled the amount of the remaining month's wages. Probably they may, and if so, these men have suffered nothing. But as this was not called to the attention of the parties at the hearing, and is not made certain, I must decide the general question. And my opinion is that on the facts of this case the men were discharged here. The statute does not apply to a case where the owners, with the consent of the crew, and in accordance with the original contract, have brought them home and paid all their expenses and their wages in full up to the time of their return.

It has been argued that the articles are void; because the law will not oblige seamen to serve in any other vessel than that on

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which they ship. The seamen did not raise this objection in season. They waited till the whole contract had been performed; and after that time a court of admiralty will not interpose excepting to see that they are fairly dealt with under the contract which they have in fact performed. In this case they appear to have received all that in equity they could possibly demand. If the owners, by the course they have taken, saved the payment of one month's wages each for these men to the consul at Port au Prince, for the use of the United States, the libellants have no cause of complaint on that account; nor can they justly demand damages for being treated as passengers during the voyage home, since they received the wages of seamen and were merely deprived of the labor.

Libel dismissed.

THE A. G. BROOKS. — THE ALICE.

FEBRUARY, 1869.

One vessel has no right, without necessity, to tack so near another vessel that the pilot of the latter cannot, in the exercise of ordinary skill, avoid her.
 When a vessel is tacking, and is out of command, other vessels must avoid her.
 A vessel sailing in a harbor in the daytime must have a lookout forward.
 As a general rule a vessel going free should pass under the stern rather than across the bows of one close-hauled.

CROSS-LIBELS for damage done on the first day of August, 1868, in the harbor of Boston, at about four o'clock in the afternoon. The weather was fine, with a five or six knot breeze. The brig Alice was sailing down the harbor on her voyage to Surinam, and the schooner A. G. Brooks was coming up on a coasting voyage from a port in Maine to Boston. The collision occurred in the Narrows, between Galloupe's Island and Lovell's Island. On the part of the brig, the allegations in the record were that she was close-hauled on the starboard tack, and her pilot saw the schooner coming towards him with a free wind, on the port tack; that the brig kept her course until it became apparent that the schooner would not clear her, and then her helm was put to port, but too late to prevent the collision.

On the other side, it was pleaded that the schooner was beating up to the town, and when near Galloupe's Island, came about from the starboard to the port tack in the regular course of navigation, and that before she could gather full headway again was struck by the brig; that she had the right of way both because she was close-hauled and because she was in stays, and that she had no duty to perform and did nothing.

LOWELL, J. I have endeavored to find out the truth from the very conflicting evidence given in, and will now state my conclusions. The preponderance of the evidence seems to me to show that the schooner was beating, and was close-hauled on the starboard tack not long before the collision, and when in that position was seen about three points on the lee bow of the brig, and from one-third to one-quarter of a mile distant. At this time the brig had come round Nix's Mate, and braced up her yards on the same tack. When the vessels were thus situated the pilot of the brig and her master appear to have thought that the schooner was bound out on nearly the same course with themselves, though they must probably have seen that she was lying nearer the wind than they were. Whether this circumstance should have warned them of the probability of her tacking I cannot say; but they observed that she did tack, and they say they observed it immediately on its taking place, and that it was made off the west end of Lovell's Island, on the extreme leeward side of the channel; and that the distance of the vessels and their relative position was such that it was more prudent for the brig to keep close to the weather side of the channel, although this would bring her across the bows of the schooner, rather than to attempt to pass under her stern, which might result in cutting her in two; that they accordingly brought the brig close to the wind, and kept her to the weather side of the channel, and, finding that notwithstanding this precaution there was still danger, they put their helm hard aport, and brought her in stays; and yet the collision occurred, though it was not very severe.

If it is true that the schooner tacked in a narrow channel when so near the brig that it was not possible to avoid her, or when it was so doubtful which course would best avoid her, that a skillful pilot acting with coolness was deceived, and in good faith and with reasonable skill chose one which resulted ill, it would be impos-

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sible to hold the schooner blameless, unless her going about was absolutely necessary to avoid the shore or some other danger. It would not then be a question who was free and who close-hauled, but why such a tack was made at that time and place. And on the other hand if it should be apparent that the schooner went in stays at a proper time and place, giving room enough and ample opportunity to avoid her, and had not got fully round on her new tack when she was struck, the question would still be not whether or no the brig was close-hauled, but why a vessel under command failed to clear a vessel which was, comparatively speaking, unmanageable.

Upon the whole evidence I am not able to say that the schooner was wrong in tacking. The libel against her, which was made soon after the occurrence, does not allege it; but says she was sailing up the Narrows with a free wind. This fact, I confess, has a good deal of weight with me as showing the opinion formed at that time; and it would seem that at a third or a quarter of a mile distant the brig might have gone astern of the schooner if it was her duty to clear her. Some experts have testified that this would be impossible; but when they afterwards give the distance in lengths of the brig it seems contradictory of their first opinion; for they give three or four lengths as being necessary for her to fall off three points, and this is less than a third of a mile. And when we add the distance that the schooner would go, which is said in testimony to have been in fact the whole width of the channel, there would seem to be no doubt that she must have cleared her, if she had starboarded as soon as she might have done. The pilot of the brig allowed what he considered to be ample room for the schooner to go about in, and she took more; and so they came together by the head. If he had undertaken to run under her stern no such nice calculation would have been necessary. I cannot but believe that either the position of the schooner, or her speed, or the course she intended to take, were misunderstood on board the brig. Nor can I doubt that the duty of making way was on that vessel. She had braced up her yards on rounding Nix's Mate; but upon the preponderance of the evidence she was not as near the wind as the schooner was, nor as near as she could go; but whether so or not, the schooner was tacking so near her that

it became her duty to avoid the probable danger, because it would arise and be imminent before the new course had been fully defined, and before the schooner could go to port or starboard as the case might require. In other words, it seems to me that the case presents the second of the predicaments which I above supposed; that is, of a vessel fully manageable and one not wholly under command. There is some reason to suppose that a lookout on the brig's deck, forward, might have called attention to the schooner earlier. Certain it is that the men were all forward, and were busy with one of the anchors, and in fact gave no report about the schooner, and although the master and pilot say they observed the tack as soon as it was made, yet that is a point on which they might easily be mistaken. It reconciles a good many of the contradictions to suppose that when they first saw that the schooner had tacked, it was too late to do any thing except to port helm; but that if they had seen her a little sooner, and starboarded, they would have gone clear. This not only reconciles some contradictions, but reconciles the result with the acknowledged skill of the professional pilot who had charge of the brig's helm. And this general view of the obligations of the parties tallies entirely with the acts of both. The evidence is clear that the brig kept her course, so far as she did keep it, not because the pilot thought he had the right of way, but because he thought there was ample room for the schooner to go about, and that he in fact did not keep his course entirely but gave a little more room to the schooner by bringing his ship still nearer the wind than she already was. In my experience, I have found nearly as many collisions (though perhaps not the most serious) to result from slight miscalculations on the part of skilful men, as from the blunders of novices. To justify a close run in cases of this kind it is necessary to reckon on the performance of both vessels, and this is where, I suppose, the mistake is sometimes made. At all events it seems to me that the duty was on the brig, and that she has failed to perform it. The very fact of want of a lookout is evidence against her until it is shown that no harm came of the neglect.

Interlocutory decree for the libellants in the first cause; libel in behalf of the brig dismissed.

J. C. Dodge, for the schooner.

H. C. Hutchins & A. S. Wheeler, for the brig.

UNITED STATES v. JOHN T. DRISCOLL.

FEBRUARY, 1869.

An errand-boy who is authorized to call for and receive his employer's letters arriving by mail, and who, after receiving such a letter, containing an article of value, embezzles it, cannot be convicted under § 22 of the act 3 March, 1825, of taking from the mail *and* embezzling the letter, because his taking was lawful.

Nor can he be convicted, under another clause of the same section, of opening a letter, not containing an article of value, before it shall have been delivered to the person to whom it was directed, if he took it in pursuance of his duty as errand-boy, because the delivery to him was a delivery to his employer within the meaning of that clause.

It is not the purpose of the post-office acts to regulate the conduct of masters and servants, but only to protect the mails.

LOWELL, J. The defendant is an errand-boy employed by the firm of Hallet & Davis, of Boston, whose duty required him to take from the post-office all letters arriving by mail to the address of his employers. He has been convicted of having embezzled or destroyed two such letters so received by him, one containing, and one not containing, an article of value. The two indictments are framed under two clauses of § 22 of the act of 3d of March, 1825, 4 Stats. 109. By the first clause, it is made penal for any person to take the mail, or any letter or packet therefrom, or from any post-office, whether with or without the consent of the person having custody thereof, *and* to open, embezzle, or destroy any such mail, letter, or packet, the same containing any article of value; and by the second clause, the offence is committed if any person shall take any letter not containing an article of value out of any post-office, *or* shall open any letter which shall have been in any post-office, before it shall have been delivered to the person to whom it is directed, with design to obstruct the correspondence or pry into another's business or secrets. The question in this case is, whether the agent or servant of a person to whom a letter is addressed is within the meaning of the above clauses of the twenty-second section?

The scope and purpose of these clauses, and of the whole sec-

tion, appear to be to protect the mails from every kind of danger while in the custody of the United States. Some of the language is broad enough to include within its literal meaning every letter that has ever been in a post-office, and every person that can deal with any such letter before it reaches the manual possession of its owner. Taken literally, the first clause is broad enough to cover even the person to whom the letter is addressed. But the law must have a reasonable construction, and one in accordance with the subject-matter, which is the due and proper custody and delivery of the mail. It must be taken to refer to letters with which the United States have concern under their power and duty to transport and deliver the correspondence of the country. It cannot be that the owner of a letter would be liable for such an act, and it is clear that the same rule applies to the agent. The first clause refers to an unlawful taking, whether with or without the connivance of an officer of the department, and without such a taking the offence is not complete. Here the taking was lawful.

The second clause of the section is not so clear. Under this clause the taking is not an essential element of the offence. The law reads "take or open," &c.; the language is disjunctive. But I think the delivery means in this, as in the other clause, delivery to the person or to his authorized agent. When such a delivery has been made, the government is discharged of further responsibility, and its functions cease to operate upon the letter. If the clerk or servant of the owner betrays his trust, that is a matter to be looked into by the authority of the State, whose laws regulate such agencies. If those laws make the act an embezzlement, there will be a remedy; if they do not, it would not be becoming in congress to do so if it could, which may be doubted. These letters had been delivered to the persons to whom they were directed, because they had been delivered to a servant duly authorized by them to receive their letters.

Two cases have been cited by the defendant's counsel: *U. S. v. Parsons*, 2 Blatch. 104, and *U. S. v. Sander*, 6 McLean, 598; in the latter of which it was held, that if a letter had been delivered to an authorized person, and the opening took place afterwards, this statute did not apply, because delivery to the agent or servant is delivery to the person to whom the letter is addressed;

and in the former, the judgment was that the United States was discharged from further responsibility in the premises, after a *bond fide* delivery, though to the wrong person, himself innocent, when the offence was begun and consummated by a stranger, after the delivery had been perfected. The views of the judges in these cases were fortified by considerations derived from the natural functions, so to speak, of the federal government, it not being probable that the United States would attempt to regulate the relation of master and servant. I am informed upon good authority that Judge Sprague has made a similar decision. I have considered this question once before. A letter had been left at a shop where the letters of the person to whom the particular letter was addressed were, with his knowledge and consent, usually left. A stranger, the defendant, intermeddled with such a letter after such delivery, and was indicted under the latter clause above cited, and the case being, by consent, submitted to me in a somewhat informal way, I ruled upon it, and the result was a *nol. pros.*

The government has cited only one case, *U. S. v. Pond*, 2 Curtis, C. C. 265, but it is one of high authority, though, I suppose, not actually binding on this court, which has concurrent jurisdiction of all criminal cases, not capital. The point there came up on a motion to quash. Such a motion is always addressed to the discretion of the court, and I understand the decision to go only to this extent, that it is not necessary to allege in the indictment that the letter was in the custody of the United States at the time it was opened. This is undoubtedly so. The remarks of Mr. Justice Curtis go further, no doubt; still, I do not consider them to go to the length necessary to support this prosecution, because they do not refer to a delivery of the letter to one authorized to receive it. Judge Sprague's opinion was given after the decision of *U. S. v. Pond* had been made, and that case was called to his attention, and he must have considered, as I do, that it was not an authority to the point now in controversy.

One of the indictments here attempts to meet the difficulty by alleging that the defendant took the letter and unlawfully opened it, but the defect is not in the indictment, but in the law; which does not meet the case. The word unlawfully is not often of much value in an indictment; it only asserts a conclusion of law, which,

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if it arises out of the facts set forth, is unnecessary, and if it does not, is insufficient. The opening may have been unlawful, but it is not made so by any act of congress. *New trial ordered.*

M. F. Dickinson, Jr., assistant district attorney, for the United States.

J. E. Bates, for the defendant.

Re FORTUNE.

FEBRUARY, 1869.

Where certain creditors attached the stock of goods of a trader for the express purpose of keeping it together and preventing waste, and the attachments were afterwards dissolved by an assignment in bankruptcy, and the sheriff had incurred charges for insurance, packing, &c., *held*,—

1. All necessary and proper charges for the care and custody of the property incurred after the petition in bankruptcy is filed, are incurred for the assignee, and must be paid by him out of the assets.
2. If the assignee has taken possession of packing-boxes, policies of insurance, &c., procured by the sheriff, he must pay for the cost of them.
3. The sheriff has no lien for his costs upon a stock of goods attached by him when the attachment has been dissolved by the proceedings in bankruptcy; but the bankrupt court has power to authorize the assignee to pay such part of the costs as can be shown, or may be presumed to have been beneficial to the estate.

BANKRUPTCY.—Several creditors petitioned for payment of the costs of attaching the property of the bankrupt. The evidence was that when Fortune stopped payment these creditors consulted together and agreed to attach his large and valuable stock of goods to prevent its being removed or disposed of; that the sheriff caused it to be carefully examined, scheduled, packed, and stored, and procured insurance upon it. The petitioners alleged that the assignee had adopted and ratified these acts, and had taken the benefit of them, and this was admitted. The petitions were not opposed.

B. F. Brooks, A. S. Wheeler, T. F. Nutter, & E. A. Kelly, for the creditors. The sheriff has a lien for these charges including that for keeping the property: *Re Houseberger & al.*, 2 B. R. 33.

At any rate the assignee may pay all reasonable expenses in-

Re Fortune.

curred for his benefit, whether before or after his appointment. He is not to take the assets and repudiate the necessary charges.

LOWELL, J. The bankrupt act of 1841, in its operation in the New England States, failed to make an equal distribution of the effects of the bankrupt because it preserved the lien which creditors can always obtain by attachment. Mr. Justice Story endeavored to remove this objection by construction. Had not the statute itself expressly reserved all liens, his argument that the assignment operated *per se* to dissolve attachments would certainly have been very strong, because the attachment is only an incident to the suit, and the bankrupt court might stay the suit; but the language of the act was fatal to this interpretation: *Ex parte Foster*, 2 Story, R. 131; *Peck v. Jenness*, 7 How. 612. The insolvent law of Massachusetts dissolved all attachments, but made the costs a preferred debt, whenever the attaching creditor chose to prove his principal debt against the assets. The act of 1867 dissolves all attachments not four months old, but fails to make provision for the costs; for section 28 refers to costs connected with or growing out of the bankruptcy. This is to be regretted, because there is an obvious injustice in destroying a valid and legal lien without compensation for the necessary expenses attending it. The creditor cannot even prove these costs and take a dividend on them, because, until judgment is obtained, they are not a debt of the bankrupt, for they were not incurred for his benefit, nor at his request.

I am unable to say that the sheriff has any lien for these costs. The attachment merely gives him a right of retainer until the suit is disposed of, and if the plaintiff chooses to discontinue his suit, or to discharge his attachment, the officer's only remedy is by action against the plaintiff himself. The report of the case in New York, cited in the argument, shows that the law is otherwise there, and that there is a right of retainer by the sheriff against the will of both parties. Applying the bankrupt act to such a law, there is perhaps no difficulty in concluding that the dissolution of the attachment does not destroy the right of the sheriff to the lien for costs, which he would have if the parties had themselves agreed to dissolve it. But I do not see how I can adopt that view here.

I have always required the assignee to pay all reasonable and

Re Fortune.

necessary expenses incurred after the date of the filing of the petition, because his title relates to that time, and he is the debtor, by relation, for all such expenses. The bankrupt is bound to see that his estate is kept together and preserved for the assignee, and all the necessary charges for the fulfilment of this duty must be allowed him: *Re Grant*, 2 Story R. 316. And there is no reason why such sums expended by any person having a lawful connection with the estate should not be paid. The premiums of insurance on policies which have come to the possession of the assignee, and all other similar charges come within this rule, because they were no part of the attachment, and the sheriff would have the right to retain the policies, boxes, &c., until he was repaid. It is like the case of a consignee of goods becoming liable for freight or demurrage; or of the owners of goods saved at sea taking them out of the hands of the salvors, and thereby becoming liable to pay salvage for which there would ordinarily be no personal action.

To recur to the more difficult question whether the mere expenses of an attachment which has been dissolved can be paid by the assignee. Mr. Justice Story authorized such a payment to be made in *Ex parte Foster*, 2 Story, R. 162, and it is the practice in the district of New Hampshire, as Judge Clark informs me, to allow them. I know of no authority to the contrary. Upon the whole I have come to the conclusion that the bankrupt court may, in the exercise of its equitable jurisdiction, require the assignee to pay such charges as appear to have benefited the estate in his hands, though incurred before the petition was filed and not protected by any absolute lien. It is a very doubtful point, and I should be glad to have my decision reviewed. It is placed on this ground: The attachment of chattels under the laws of Massachusetts requires for its validity that a keeper should be put in possession to preserve the goods to answer the judgment. When the attachment is dissolved by the assignment in bankruptcy it must usually happen that the assignee gets the benefit of this keeping. In this case the benefit is proved as clearly as such a fact can be proved, and it was the distinct purpose of the creditors that this result should be obtained. Equitably considered the assignee has received a benefit, and should sustain the burden. There are some analogous cases to be found, though it must be

Re Needham.

admitted that they are rare. In England, under a statute which has since been modified, the assignees were empowered to pay for services rendered to a committee of trustees, though the deed appointing the trustees was never valid under the bankrupt law. See Griffith & Holmes, Bankrupt Law, 1070, where this and some other similar decisions are mentioned by the learned authors. Our law at § 17 speaks of the necessary disbursements of the assignee, which is very like the language of the English statute under which those decisions were made. But I rely mainly upon the practice of Mr. Justice Story, which was undoubtedly followed throughout this circuit.

*Ordered accordingly.*¹

Re NEEDHAM.

FEBRUARY, 1869.

The omission from the bankrupt's schedule of the names of certain creditors with their consent expressed or implied, and for the reason that they did not intend to take dividends in competition with his trade creditors, will not bar the bankrupt's discharge on the objection of the other creditors who show no fraud or injury to their rights.

Such an omission was wilful in a strict sense; but the oath to the schedule was not wilful false swearing, under § 29, because the bankrupt had reason to believe, and did believe, that these persons did not wish to be considered creditors of his estate. The right to be such creditors they could waive for the benefit of the general creditors.

LOWELL, J. The only objection now relied on to prevent the bankrupt's discharge is the omission from his schedule of the names of three of his creditors, who have not themselves made objection. The evidence tends to show that these creditors were friends from whom the bankrupt had borrowed the capital for his business, and that they did not expect to be paid in competition with his trade creditors, and have not been paid. No actual fraud or injury to creditors is shown or suggested. Although the omission may have been wilful in one sense, yet it would be unjust to say that the bankrupt's oath to schedule B. was wilful false swearing under

¹ After this case was printed it was discovered that the date should be October, 1869.

The Annie Leland.

section 29 ; because he had reason to believe and did believe that these persons did not wish to be considered creditors of his estate. It was a privilege they could waive, and their action tended to the advantage of the other creditors by increasing their dividends. The latter cannot object to it under these circumstances.

Discharge granted.

Hull & Childs, of New York, for the general creditors.
J. H. Whitman, for the bankrupt.

THE ANNIE LELAND.

MARCH, 1869.

A schooner laden with coal stranded upon the rocks and in a dangerous situation was got off and saved by salvors from the shore at their own risk and responsibility, while the crew were dismantling her by orders of the captain preparatory to abandoning her as a total loss. *Held*, that the salvors were entitled to a more liberal compensation than in many other cases where the property saved was of greater value ; and that their merit was not diminished but increased by the fact of the incompetency and perhaps bad faith of the captain.

The service was performed by twenty salvors in a few hours and with no danger. On a value of \$11,000 saved, \$2,600 and costs allowed as salvage.

SALVAGE. — The schooner Annie Leland, with a cargo of coal on board, and bound to Boston, went on shore on Nashawena rocks, in Vineyard Sound, on the night of the 10th of September, 1868. The weather was thick, but not otherwise severe, and the vessel was discovered in the morning by the master of a fishing-smack, which had been anchored not far off ; and he went on board, and found the master of the schooner determined to abandon her, and agreed with him to strip the vessel and take the rigging, sails, and other movables on board his smack, and carry them to the nearest port. Other persons came from the islands soon after, and among others, Captain Church of Cuttyhunk. To him the master said that his schooner was bilged, and that he was going to New Bedford to note a protest and communicate with the owners, but that he should be glad of assistance to save whatever could be got out of the wreck ; and Captain Church returned to the island for shovels and other means of

The Annie Leland.

getting out the coal. The master soon after went to New Bedford, which was fifteen miles to leeward, and did not return until night, after his schooner was on her way to the same port. Presently after leaving his vessel, he engaged the services of one or two men connected with a schooner larger than the smack, to aid in the stripping and removal of the anchors, rigging, &c.; and when he arrived at New Bedford he telegraphed to his owners that the vessel was wrecked and lost.

When Captain Church came on board again, he had a conversation with the mate, and induced him to sound the pumps, and finding that the vessel was not bilged, at once inferred that she might be got off at high tide. The mate declared that his instructions did not look to an attempt to save the vessel; and after some discussion it was agreed that Captain Church might make the trial at his own risk and expense, the mate proceeding, meanwhile, to dismantle the schooner in obedience to his orders. This agreement did not differ from an ordinary salvage undertaking, in so far as the payment depended on success; but it was understood that, in addition to this contingency, Captain Church was to make good any loss of anchors, chains, or cables, that might result from an unsuccessful endeavor to haul the vessel off. A good many persons had now arrived from the islands with three boats, two of them long-boats; and under Church's orders they got up the port anchor, and carried it out to the most available place at considerable trouble and some risk, one boat being somewhat injured by striking against the anchor. They then hauled taut on the line, and proceeded to shovel coal out of the after part of the vessel, which was the part that was resting on the rocks, and pumped the water out of the hold. All this time the crew and hired men were sending down the topmasts and unreeving the rigging; and the singular spectacle was presented of strangers busily working to save a vessel which her crew were as diligently rendering unseaworthy. After they had got out as much coal as the boats could safely and conveniently carry, some of the libellants went on shore for dinner, and, returning before the tide had fully risen, found that the remaining salvors and the crew had hauled the vessel off the rocks. They all then set to work and bent on the jibs, rigged a spar to the rudder,

The Annie Leland.

which had been unshipped and damaged, carried out a kedge to help sheer the schooner from the rocks, when she took the wind, and got her under weigh. Eight out of the twenty salvors remained on board for twenty-four hours longer, until the vessel arrived at New Bedford, two of whom were needed to steer her, and one to pump, and the others to help work the vessel, which steered very badly.

The total value saved was from ten to eleven thousand dollars.

LOWELL, J. The rule of court which was passed in the interest of all parties to salvage suits, that the value should be ascertained before the property is delivered, was not observed in this case; and though this happened through a misunderstanding, yet I remark upon it, that it may not occur again. In such a case, doubtful evidence will be construed most strongly against the owners, because they might have made the facts clear before executing their warrant to deliver.

In awarding the salvage in this case, I find it to be one for a proportionately larger compensation than many others in which the value saved has been more considerable. The owners were in great danger of losing their whole property. It is true, this was largely the fault of the master; but as there is no pretence of any collusion between him and the libellants, they are entitled to say that they have saved the vessel in spite of his incompetency or bad faith, against his instructions, at a very critical time, and by the exercise of the qualities which he should have supplied, as well as of the ordinary skill, labor, and energy expected of persons in their situation.

There is some reason to suppose that the master and his brother were considerable owners in the vessel, and that the master at least was insured against a total loss only. Whether this was the true motive of his conduct or not, it is certain that Captain Church assumed more than ordinary responsibility and incurred unusual liability in this case; and upon the principles of the admiralty law, he must be compensated for them. There is no probability that the mate and crew could or would have saved the property without the aid of the libellants. The only chance was of the vessel's floating in spite of them; and as she had already lain over one tide, this chance appears a very slight one. The place was rocky,

Foster & al. v. Ames.

and she had pounded hard and was found to be much chafed, and a hole might have been made in her planks at any moment. The libellants ask for four thousand dollars, the claimants are said to have offered five hundred: I award two thousand six hundred dollars and costs. The apportionment among the salvors is to be referred to the court before distribution is made.

Decree accordingly.

T. M. Stetson, for the libellants.

J. C. Dodge, for the claimants.

CIRCUIT COURT.

D. FOSTER & AL v. P. A. AMES.

MARCH, 1869.

The circuit and district courts of the United States have jurisdiction of a bill by an assignee in bankruptcy, to redeem a chattel mortgage made in Massachusetts.

The district court has power to order chattels in the possession of the assignee, and on which there is a mortgage, to be sold free of the incumbrance, and the mortgagee's lien is then transferred to the proceeds of sale.

This power depends upon the true construction of the first section of the bankrupt act, and may be exercised notwithstanding the mortgagee has by his contract a right of immediate possession of the goods, and desires to avail of that right.

Such an order ought not to be passed when a mortgagee, whose title is admitted to be valid, would be injuriously affected, as where there is clearly no market value for the property, or not more than the amount of the mortgage.

The bankrupt court may in some cases order the assignee to expend money in finishing goods for sale, when it is clearly shown that a benefit must result to the estate, and that the work can be done within a reasonable time.

BILL in equity by the assignees of McKay & Aldus to restrain the service of a writ of replevin by mortgagees of machinery and other personal property. The bill charged that the bankrupts were largely engaged as makers of locomotives, machinery, and other like articles, in Boston, and being insolvent, mortgaged all their personal property to the defendant Ames, as trustee for himself and the other defendants composing the firm of Page, Richardson & Company, October 17, 1868, to secure an antecedent debt, as well as future advances, and with intent to prefer the

The Annie Leland.

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The total value saved was from ten to eleven thousand dollars.

LOWELL, J. The rule of court which was passed in the interest of all parties to salvage suits, that the value should be ascertained before the property is delivered, was not observed in this case; and though this happened through a misunderstanding, yet I remark upon it, that it may not occur again. In such a case, doubtful evidence will be construed most strongly against the owners, because they might have made the facts clear before executing their warrant to deliver.

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Such an order ought not to be passed when a mortgagee, whose title is admitted to be valid, would be injuriously affected, as where there is clearly no market value for the property, or not more than the amount of the mortgage.

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mortgagees who had reasonable cause to believe them insolvent; that the defendants laid claim to all or nearly all the assets from which a dividend could be realized, including unfinished locomotives, which in their present state were of little value, but which could be finished in a short time and at comparatively small cost, and would then be worth a large sum; that if carefully managed the assets would probably realize a handsome dividend, but if pressed for sale under the power in the mortgage would be sacrificed. That the said McKay & Aldus filed their petition in bankruptcy, December 15, 1869, and that on the day the plaintiffs were appointed assignees, the defendant Ames sued out of the circuit court the writ of replevin now sought to be enjoined, with intent to obtain immediate possession of the property, and forthwith to dispose of the same, which suit is irregular, because twenty days' notice thereof was not given to the assignees.

On the same day that this bill was filed in the circuit court, the assignees filed a petition in the district court, praying that the unfinished locomotives might be finished and sold for the benefit of all parties interested, and that the mortgage to Ames might be declared void, &c. By consent, both cases were heard together upon affidavits addressed to the motion for a preliminary injunction. It appeared that the mortgagees had made advances in cash and by accommodation acceptances to the amount of about one hundred and fifty thousand dollars; that for the debt alleged to have been incurred before the mortgage was given, there was collateral security taken at the time it was contracted, which, at its supposed value, exceeded the amount of that part of the debt; and that all the advances were made under a written promise of full security by way of mortgage.

D. Foster & T. K. Lothrop, for the plaintiffs. 1. The district court has jurisdiction to settle all controversies between the assignees of a bankrupt and persons claiming any lien or adverse interest whatever, and to order the property to be disposed of, leaving all incumbrancers their just claims against the proceeds: *Ex parte Christy*, 3 How. 292; *Neal v. Beckwith*, 2 B. R. 82; *McLean v. Lafayette Bank*, 3 McLean, 587; *Ex parte Stewart*, 1 B. R. 42; *Re Salmons*, 2 B. R. 19.

2. The power should be exercised in this case, because it is

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' parties that the property should not
 u ; and because it must be assumed
 le of the mortgagees is at least doubt-

s have no right to foreclose excepting under
 court of bankruptcy, nor to bring a writ of re-
 twenty days' notice.

mas & J. D. Ball, for the defendants. 1. The affi-
 now that our mortgage is valid. All the advances were
 under a written promise for security, and we actually took
 contemporaneously with each advance.

2. By the terms of the mortgage we have the right of possession ;
 d section 25 of the bankrupt act gives the court power to order
 sale of property in dispute only when it shall not have been
 ten from the possession of the assignee by process of law.

3. The court has no authority to permit the goods to be fin-
 iced. They can only be sold. No section of the statute, and no
 le of court, contemplates that the assignees shall carry on the
 siness of the bankrupt. In England there was such a power,
 d it has been purposely omitted by those who drew up our
 nkrup act. See 1 and 2 Wm. IV., ch. 56, § 35 ; 12 and 13
 ct., ch. 106, § 150, under which it has been decided that the
 jection of any creditor will avail to prevent the exercise of this
 ht by an assignee.

4. Replevin is not one of those actions of which notice must be
 ren, as is seen by comparing sections 14 and 25 of the bank-
 pt act and the law of Massachusetts, from which section 25 is
 ren : Gen. Stats. ch. 118, § 54.

5. This cannot be a bill to redeem, because there is no equity
 redemption in chattels : Gen. Stats. of Mass., ch. 151, §§ 4, 5 ;
ber v. Hamlin, 97 Mass. 489.

LOWELL, J. It is admitted that either the circuit or the district
 irt may entertain a bill by an assignee to redeem property mort-
 ged by the bankrupt. It is said, however, that there is no equity
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 diately upon a breach, unless some remedy is given by statute ;
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 e, according to sections 4 and 5 of chapter 151 of the General

The Annie Leland.

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he ought to have the right to foreclose. In this case there appears to be both a serious dispute of title, and reason to believe that the mortgagee's rights will not be injuriously affected by the sale.

It was strongly urged that whatever power might otherwise exist, the 25th section clearly indicates that an adverse claimant may sue out replevin at any time before the court has ordered a sale. Such appears to be the effect of the latter part of that section, but it may perhaps be neutralized by the earlier part which gives the power to the court to order the sale, not only of property in possession of the assignee, but of all "which is claimed by him," and Mr. Justice Swayne has held, in the case cited in the argument, that the power does extend to property in the possession of an adverse claimant: *Neal v. Beckwith*, 2 B. R. 82. It may be observed in support of this view, that the Massachusetts statute, from which section 25 of our act is evidently taken, has not the words "or which is claimed by him," so that that law only authorizes the sale of property in the possession of the assignee; and then the proviso that the possession may be recovered by replevin at any time before the order of sale, is harmonious with the remainder of the section, and perfectly intelligible, and these additional words may have been inserted in the bankrupt law for the very purpose of effecting a change. I do not decide this point, and have considerable doubt upon it. But I am clear that under the full powers given by section 1, I can order the sale of mortgaged property which is in the possession of the assignee, whether there is any dispute of title or not, and that section 25 does not take away this power, and that when the assignee has applied for such an order it is too late for the mortgagee to avoid it by replevin. What I doubt is, whether when the case is not one concerning liens and incumbrances upon property in the assignee's possession, but a mere adverse title asserted by a third person, the assignee can force a sale against the will of the adverse claimant.

Another important question which was very strenuously debated, was, whether the court can authorize the assignee to finish the locomotives at the expense of the estate. There is no express provision of the statute touching this point, but, upon careful reflection, I am satisfied that where a great advantage will result to the estate, and within a reasonable time, the assignee may be

United States v. Pressy.

permitted to expend money in this way. I do not refer to trading; I cannot see that buying and selling as a trader can come within the scope of the assignee's duty, but his office being to sell and collect the assets, he may, by order of court, put the assets into a merchantable form, as by cutting timber, harvesting crops, and the like, and so of finishing unfinished goods, though not, perhaps, working up mere raw materials, unless under very peculiar circumstances. I yield to the argument that the necessary delay must not be at the risk of the mortgagee, and due order can be taken for his protection, by a deposit of money, or in some other way, if necessary.

Temporary injunction ordered in the suit in the circuit court. Reference of the petition in the district court to ascertain what part of the goods can be sold at once; what part, if any, can be advantageously finished, and within what time, and at what expense; what part of the goods is covered by the mortgage, and the consideration and validity of the mortgage. Leave given to all parties to apply to the court from time to time as they may be advised; and to the mortgagee to apply to have the proceeds of sales of goods embraced in his mortgage, paid over to him from time to time, on proper terms.

DISTRICT COURT.

UNITED STATES v. SAMUEL J. PRESSY.

APRIL, 1869.

A pedler who has duly applied to the assessor for a license in April, is not indictable for carrying on business without payment of the special tax, between the first and seventh days of May, before the tax was, in the usual course of business, assessed upon him for that year, if he intended during that time to pay the tax when it should be assessed, although when the tax bill was presented him on the twenty-first of May he refused to pay it, having stopped business on the seventh.

THE defendant was indicted under the seventy-third section of the act of 1864 as amended by that of 13 July, 1866, 14 Stats. 113, for carrying on the trade or business of a pedler of the third class without paying the special tax imposed on that business by the same statute. The evidence tended to show that the defendant

had duly paid his tax for 1867, and that in April, 1868, he duly applied to the assessor of internal revenue of his district to pay the special tax for that fiscal year, beginning with May 1, 1868; that four or five days afterwards he sold out his business, and had not carried it on since. The taxes were usually assessed about the twentieth of May in each year, and the bills were sent in on the next day. The defendant's bill was sent him as usual, but he had neglected and refused to pay the tax, and was indicted in January, 1869.

LOWELL, J., ruled that if the defendant had been guilty only of a neglect or refusal to pay his tax after he had ceased to carry on the business, he was not, for that alone, liable to indictment under the section cited. That the offence described in the law was the carrying on a trade or business without payment of a tax, and if the defendant, when he carried on the business before his tax was levied, had no intent to defraud the government, he could not be lawfully convicted. His application to be assessed was all that he could do, or was bound to do, until the bill was rendered. So that, while many defendants had been rightly convicted under this section who had never been assessed for a tax, because the failure to assess them arose out of their own wrong in not making application to the assessor, and therefore they could not be heard to object the want of assessment; yet this stringent penalty was not intended for delinquent tax-payers merely as such, if they had been guilty of no act or omission at the time they carried on their business. The government officers, in adopting what appeared to be a reasonable and perhaps necessary practice of giving credit for the tax for twenty days while their lists were preparing, did not thereby expose all tradesmen to indictment who took advantage of that credit.

The district attorney declined to go to the jury on the question of intent, and the defendant was acquitted.

M. F. Dickinson, Jr., assistant district attorney, for the United States.

S. E. Floyd, for the defendant.

Ex parte Jaffray. — Re Waite & Crocker.

Ex parte JAFFRAY. — Re WAITE & CROCKER.

APRIL, 1869.

creditor who successfully prosecutes a petition *in invitum* for adjudication of bankruptcy, may tax reasonable counsel fees as part of the costs to be paid in full out of the assets.

the fee bill of 1853, 10 Stats. 161, does not interfere with the practice of courts of equity to allow counsel fees as costs in certain cases.

costs can be taxed for only two counsel of the same party.

the expense of a short-hand writer cannot be taxed.

LOWELL, J. The petition in this case was filed against the bankrupts by a firm whose debt was much larger than those of all other creditors together, and was founded on an alleged act of bankruptcy committed in the then recent execution of a mortgage of the entire property of the bankrupts. A jury trial was waived and a long hearing was had before me on oral evidence, which resulted in an adjudication of bankruptcy, on the ground that the mortgage was a technical fraud;¹ and following upon this a compromise was made by the assignees with the mortgagee, by which about eight thousand dollars were paid for the benefit of the unsecured creditors, assuring them a dividend of twenty-five per cent. The case is now ready for settlement, and the petitioning creditors ask that counsel fees may be allowed them out of the state. The assignees do not oppose, but submit their rights and duties in the premises to the decision of the court.

Two authorities are cited in support of this taxation: *Re Williams*, 2 B. R. 28, and *Re O'Hara*, 8 Am. Law Reg. (N. S.) 113, and none are known to me which are opposed to it; but, on the contrary, I am informed that the practice has been followed in some districts in cases which have not been reported. The reasons given in these judgments for allowing counsel fees to be paid out of the fund are convincing. A petition *in invitum* to have a debtor adjudged bankrupt is for the benefit of all his unsecured creditors; and a favorable decree gives them all a proportionate advantage, and the court has no power to order, as is often done in chancery, that this advantage shall depend upon their contribut-

¹ *Re Waite & al. supra*, 207.

Ex parte Jaffray. — Re Waite & Crocker.

ing to the expenses of the suit; but any creditor may carry on the proceedings if the petitioner should refuse or neglect to do so; and after adjudication all may prove their debts. In this case the fund from which the dividend will be paid is due entirely to the exertions of the petitioners in setting aside the mortgage; and in most cases, though not in this, no single creditor, nor any three or four of them, have a sufficient interest to enable them to undertake the conduct of the proceedings without positive loss of money if they cannot tax the expenses upon the fund, for those expenses will usually exceed the dividend on their debts. At the same time the promptness and secrecy which are often vital to the success of these cases, the number and various residences of the creditors, and the difficulty of combining them in any joint enterprise, present obstructions, some of which will exist in all cases, and which must tend to prevent this matter from being properly regulated by agreements among the creditors before suit brought, and to discourage a resort to the court of bankruptcy in those cases in which its jurisdiction is the most necessary and beneficial, and to put creditors at a disadvantage in their dealings with a debtor who is disposed to force them into a settlement of his own proposing. Such settlements, when fairly entered into between persons equally informed of their rights, and equally able to enforce them, are not to be discountenanced; but it is of the utmost importance that the parties to them should stand, as far as possible, on equal ground.

The strong equities of the petitioners' case are not difficult to discover; and the practice under the act of 1841 was to allow such a charge out of the assets, as I find by examining the records. My doubt was of my power in the premises under the fee bill of 26 Feb., 1853, 10 Stats. 161, which does not appear to sanction it, and does appear to be intended to cover the whole ground of taxation of costs at law and in equity and admiralty; and by the general orders, these petitions follow the rule of cases in equity in all matters of costs. Upon reflection I have concluded that the fee bill is probably intended to reach only taxable costs commonly so called, and may have its full effect without being construed to take away the power of a court of equity to permit counsel fees to be taxed in those cases where a fund is in court, upon or

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to which different parties have distinct rights or claims, as when a trustee applies for instructions, and causes the adverse parties to interplead. In these and some other cases, in the Massachusetts practice, the statutes regulating costs are not held to have taken away the power of the courts in this matter.

I have been referred to the record of a case in equity in the circuit court in which Judge Sprague, since the passage of the fee bill, ordered the counsel fees of all parties to be paid out of the fund; and Judge Kane adopted a like rule in *ex parte Plitt*, 2 Wallace, Jr. 453. These decisions, and those in bankruptcy already cited, fully justify me in construing the statute in the way which the equities of the case so clearly demand.

The register has reported that the fees charged are reasonable, and that full value has been received for them in the services rendered. In this opinion I concur; and considering, as I have already shown, that the dividend as well as the adjudication depended upon the result of the hearing, the petitioning creditor did the work of the assignee as well as his own; and it was so well done that no further action was needed. I shall allow the charges for retainers and those for the trial fees of two counsel as taxed; three counsel are not permitted to speak for the same party, and did not do so in this case; and I must disallow the taxation for the third counsel. Nor can I, consistently with our practice, tax the charge for reporting the evidence. It is to be hoped that the time will come when we may employ a short-hand reporter responsible to the court, as is now done in many other tribunals; for the practice would undoubtedly tend to the furtherance of economy as well as of justice.

Counsel fees to be taxed.

Edwin H. Abbot, for the petitioning creditors.

Re J. H. BEAL.

MAY, 1869.

If a bankrupt has property in his possession, and has the use of it as his own, and wilfully omits it from his schedules and keeps it from his assignee, it is no answer to a charge of concealment thereof that the property belonged of right to his assignees under an earlier assignment in insolvency, under the laws of the State of his residence.

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If a bankrupt has the actual possession of joint estate and joint books of account, he must disclose them to his separate assignees, and if he wilfully fails to do so, is not entitled to a discharge.

HEARING BY THE COURT ON OBJECTIONS TO A BANKRUPT'S DISCHARGE. — It appeared that in 1866 the bankrupt carried on business in Boston, in partnership with one Ricker; and in the autumn of that year he bought for the firm a large quantity of goods on credit, and disposed of them in various ways, which his creditors thought to be fraudulent, under the insolvent laws of Massachusetts; and upon their petition the firm was adjudged insolvent. Their books were never found by the assignees, and the goods were never accounted for, and no discharge was ever granted them. Ricker was then and since a resident of New York, and the business here was conducted chiefly by Beal. The judge said that although the law of this State, in most respects, so far as such acts as then alleged against the firm of Beal & Ricker were concerned, was substantially similar to the bankrupt law, yet none of those acts could be set up in bar of his discharge here, because they were all done before the bankrupt law was passed.

J. D. Ball, for the creditors. If we trace goods and books of account into the bankrupt's possession in 1866, and show that he did not in fact hand them over to his assignees in insolvency, or otherwise account for them, the presumption is that he still has them, and as he has made no return of any such property or books in his schedules, nor delivered them to his assignees in bankruptcy, he must now account for them, or be deemed guilty of concealment, and fail to obtain his certificate of discharge.

E. Avery, for the bankrupt, contended that whatever estate he possessed or was entitled to, and whether concealed or not, passed to his firm's assignees in *insolvency*, and that they had full power to inquire into all his dealings, and to set aside fraudulent conveyances, and must be conclusively presumed to have done their duty, or whether they did or not, that nothing was left for the assignees in bankruptcy, and therefore nothing can have been wilfully concealed from them.

LOWELL, J. The question is one of fact, whether this bankrupt had, at the time of his bankruptcy, any estate or effects, or any books relating thereto, which he has concealed. If he had such

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de facto, though by a defeasible title, he must set them out in his schedules, and give them to his assignees. It is not for him to rely on the title of a third person, which he has not himself respected. The presumption is that he surrendered all his property in 1866; but that is a presumption of fact, and if he did not, it is not important whether his motives were good or bad, whether his acts were done with the consent or against the will, and in fraud of the rights, of his then assignees. The possession of assets in the use and enjoyment of the bankrupt makes a sufficient title for his assignees in bankruptcy until the earlier assignees shall dispute it. A like argument applies to the books of account, though with somewhat greater force, because they are not so much assets as means of evidence, and might well be left in the bankrupt's possession after they had been inspected and made use of by the former assignees.

Again, it is said that the books and the property, if any there were, belonged to the firm of Beal & Ricker, and the firm is not in bankruptcy. But if this bankrupt had in his possession any of the joint estate, it would pass to his assignees, who would hold as tenant in common with the solvent partner. Whether the latter could take possession and control of it, subject to account, would depend on circumstances. Speaking generally, he could not; and, in any event, it must be disclosed in the bankrupt's schedules.

Finally, it was argued that these assignees, who happen to be the very same persons who were the assignees in insolvency, knew all that they now know long before the bankruptcy, and therefore there has been no concealment from them. As I state this argument, I fear that I must have misunderstood it; if not, it is easily answered. A concealment of property and books from a person entitled to their possession is not the less a concealment of them because he knows they are concealed, if he does not know where they are concealed. The facts in the case show a studied and protracted evasion on the part of the bankrupt of all information on the subject of his property and books. He seems to be very hostile in his feelings toward the assignees, and this may possibly account for his mode of meeting the necessary and proper inquiries which were made of him in his examination before the register; but the natural inference is that he was seeking to conceal the truth. He undertook, towards the close of the hearing, to account for his trade property by the

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payment of large debts by way of preference ; but the explanation seemed to come very late. I do not feel by any means sure that he has any estate, but upon the evidence I can hardly say that he has not. There is every reason to suppose that he has the books of account of Beal & Ricker, unless he has destroyed them ; and on the ground that he has concealed them from his assignees I refuse his discharge.

Discharge refused.

CIRCUIT COURT.

WILLIAM A. CALDWELL v. DAVID J. HARDING & AL., *Administrators.*

May term, 1869. Before CLIFFORD and LOWELL, JJ.

The master and managing owner of a ship which was partly owned in the rebellious States insured the interests of the southern owners, and, the vessel having been lost, collected the insurance money ; he likewise collected earnings of the vessel ; all this while the war was going on. *Held*, that after the peace he was bound to pay the southern owners their share of the moneys so collected.

If the contract of insurance was illegal, the implied contract by the agent to pay over the moneys collected on the policies was not so after peace.

The defendant was an administrator appointed in Massachusetts, and the plaintiff had brought an action against him for the same cause in the circuit court of the United States for the southern district of New York, which was dismissed for want of jurisdiction : *Held*, that the action was abated or defeated in consequence of a defect in the form of proceeding, within § 5 of Gen. Stats. of Mass. ch. 97, and so the new action might be brought within one year after the old one was determined.

ASSUMPSIT for moneys received by the defendant's intestate to the use of the plaintiff. Most of the facts were agreed ; but when the cause came on to be heard by the court, it was found that the agreement left certain matters to be decided by the court upon the written evidence, and lest the parties might be embarrassed in taking a writ of error if they should desire it, they filed a stipulation, by suggestion of the court, waiving a jury trial, in accordance with the act of 3 March, 1865, § 4, 13 Stats. 501. Under this stipulation this cause was heard, and the court decided that the facts shown by the written agreement of the parties and by the amendment thereto and by the exhibits therein referred to and annexed, were to be taken as facts in the cause, and that the policy of

insurance for three thousand dollars on the vessel therein mentioned was made for the benefit of the three southern owners, of whom the plaintiff was one; and that the policy for five thousand dollars on freight was for the benefit of all the owners.

The facts of the case were, that the plaintiff was an inhabitant of Charleston, S. C., and so continued during the war, and was owner of one-sixteenth of the bark *Lamplighter*. Two other owners, who together owned three-sixteenths, and whose cases, by stipulation, depended on the decision of this, lived in the insurrectionary States. The remaining owners, who were many, lived in Massachusetts.

In October, 1861, the bark was seized on behalf of the United States, and was proceeded against by a libel of information in the district court for the southern district of New York, as forfeited under the act of congress of 13 July, 1861, §§ 5, 6, and under the president's proclamation, issued in pursuance of said act, see 12 Stats. 257. John Payne, the master of the ship, and who was one of the owners, intervened for his own interest and that of all the other owners but one, and filed a stipulation for value, with sureties, and the vessel was released, and made voyages and earned freight which was paid to Payne. In October, 1862, the bark was lying at New York, bound on a foreign voyage, and, at the request of Payne, a firm of brokers procured a policy of insurance for three thousand dollars on the vessel and one for five thousand dollars on the freight, both of which were made to the brokers for whom it might concern, the former of which the court found to have been in fact made for the benefit of the three southern owners only, and the latter for all the owners. The vessel soon after proceeded to sea, and was destroyed by the *Alabama*. In December, 1862, the northern owners petitioned the secretary of the treasury for a remission of the forfeiture of the vessel, and their petition was granted; the libel was discontinued, and the stipulation cancelled. Afterwards, the brokers collected the insurance money, less the premiums, and paid it to Payne, who accounted to the northern owners for their respective shares of the insurance on the freight, and for their proportions of the earnings of the vessel. He did not account to the plaintiff, and died in 1865. He was domiciled in Massachusetts, and the

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defendants were duly qualified here as his administrators in September, 1865, and gave due notice of their appointment. This suit was brought in January, 1868, to recover the plaintiff's share of the freight and insurance moneys above referred to. An action for the same cause was brought by him against these defendants in the circuit court of the United States for the southern district of New York in July, 1866, and was decided for the defendants in October, 1867, upon the sole ground that the court had no jurisdiction of actions against administrators appointed in and under the laws of Massachusetts.

LOWELL, J. The first defence taken in this case is the statute of limitations of Massachusetts, which requires actions against administrators to be brought within two years after they have given bond, Gen. Stats. ch. 97, § 5. The seventh section of the same statute provides that, if an action is brought in due season, and is abated or defeated in consequence of any defect, &c., or of a mistake in the form of proceeding, the plaintiff may commence a new action for the same cause within one year after the determination of the original suit. In deciding whether the former action between these parties was defeated in consequence of a mistake in the form of proceeding, we may well look at the decisions upon the corresponding section of the general statute of limitations, which is very similar in its terms, and has been longer upon the statute-book, Gen. Stats. ch. 155, § 11, and we shall find that the supreme court of Massachusetts have given to this exception a liberal interpretation in favor of meritorious creditors. The tendency of their decisions is to bring all mistakes which have defeated actions, independently of their merits, within the saving of the statute. Thus, a mistake in the residence of the defendant is held to be an unavoidable accident within that clause: *Bullock v. Dean*, 12 Met. 15; a mistake of the clerk in not entering a writ, by reason of which the action was dismissed, was a matter of form: *Allen v. Sawtelle*, 7 Gray, 165; and where an action was dismissed for want of jurisdiction, because brought in a county where neither of the trustees lived, it was held to be defeated for a matter of form: *Woods v. Houghton*, 1 Gray, 580. It was argued to us that the court in the case last cited had jurisdiction of the subject-matter and of the parties, and so a mistake of *venue* was a merely formal

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mistake. But it was a mistake which went to the jurisdiction of the court, in that county, and the fact that it was the same court, and not some other, that had jurisdiction in the proper county, was not of the essence of the decision. If the miscarriage here had been in the circuit court in Maine instead of New York, the cases would be exactly analogous, but the decision ought to be the same. It was said, indeed, that this was a more considerable mistake; but that is immaterial; the statute intends to guard suitors against mistakes which are not of substance, whether large or small. The mistake in the first case of *Woods v. Houghton* was one of law, and was patent on the writ, or it could not have been dismissed on motion. Indeed, the argument for the defendant in the second case was that a mistake of jurisdiction, patent on the writ, was not a mistake of form. We do not regard the difference in language between the two statutes to be important in the present case. In one it is "any matter of form," and in the other, "in the form of proceeding." The latter is more like the phrase used in the old statute of 1793, ch. 75, § 2; but granting that a mistake of this character is a mistake in some matter of form, it seems to be in the form of proceeding. No argument was founded on the difference; nor do we perceive that there could well be one.

The defence upon the merits rests upon the effect attributed to the state of war which existed between the United States and the States in rebellion, during the time that most of the freight money was earned, and when the insurance contracts were made and the losses settled. It is argued that an express promise by Payne to pay the freight money to the plaintiff would have been illegal, and so an implied promise could not arise, for the law will not imply an illegal promise. This would have been a good defence to an action brought during the war. The law prohibits ordinary commercial intercourse between enemies on grounds of public policy, and if Payne had expressly promised to pay, during the war, or had accepted a bill of exchange drawn at that time for the purpose of transferring the funds during war, the contract would have been illegal and could not be enforced even after the return of peace: *Willison v. Patteson*, 7 Taunt. 439. But war does not confiscate debts or property for the benefit of debtors or agents, but only suspends the right of action. It is no longer illegal for

the defendants to pay the plaintiff, and the law will imply a promise to pay money when it ceases to be illegal to do so.

In respect to the insurance moneys it is said that the contract to insure the vessel of the plaintiff, or his freight, was illegal, and that the insurance companies could not have been obliged to pay the loss, and having paid it to Payne he cannot be obliged to account to the plaintiff. Assuming the illegality of the original contract, it by no means follows that the plaintiff cannot recover. If I employ an agent to rob or cheat my neighbor, I cannot oblige him to account to me for the spoil, because in order to do this, I must display the defect of my own title. But if I send a second agent to receive the money of the first, and he does receive it, my title as against him depends on his having received it in my name from a person who voluntarily paid it. So here Payne having collected the loss in behalf of the plaintiff cannot say that the insurance companies need not have paid it. The argument for the defence relies very much upon the fact that Payne procured the original insurance, that is, ordered the brokers to have it made; but this is immaterial; when made it was a contract between the plaintiff and the companies, and when Payne collected the loss of the brokers, he was not concerned with the original contract. I do not mean to say that the brokers would have been in any different position. Making the contract and receiving the payment were distinct and independent acts of agency, which have no legal connection with each other. If indeed the insurers had been deceived and had paid the money in ignorance of facts which invalidated the policy, and had discovered the mistake before the brokers paid over to Payne, an action might probably have been maintained against the brokers to recover back the sums so ignorantly paid. If the payment had already been made to Payne, it is more doubtful whether the action would have lain against him, because he never contracted with the companies. But waiving this point, the case before us does not show any ignorance or mistake in this behalf, and if it did the statute of limitations would protect these defendants; though the plaintiff might still be liable to the companies.

The parties have agreed that there should be but one bill of costs in the three suits, and that in the event of a decision for the

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plaintiff this action should be sent to a commissioner of this court to state an account. *Order accordingly.*

E. D. McCarthy, of New York, for the plaintiffs.

C. F. Blake, of New York, for the defendant.

DISTRICT COURT.

Re HIRAM LITTLEFIELD.

JUNE, 1869.

It is not essential to the debtor's discharge, that the assignee should give due notice of his appointment.

Nor that the second and third general meetings of his creditors should be held at the expiration of three months and six months respectively, from the date of the adjudication.

If a creditor wishes to examine the bankrupt, he must procure an appointment from the register of a time and place for the examination. It is not the bankrupt's duty to see to the appointment, but to be ready to attend on due notice.

Whether if a debtor attends and refuses to be examined, there is any remedy excepting by motion to commit, *quære?*

It is necessary to the discharge of a bankrupt trader, that he should have kept a cash-book subsequently to the passage of the bankrupt act.

LOWELL, J. The first objection taken to the discharge of this bankrupt is that the notice of the appointment of his assignees was not published in the mode pointed out by section 14 of the act. It seems that instead of being published once a week, for three successive weeks, this notice was, in one of the newspapers, published three times in the course of two weeks. This is not a ground for refusing the discharge. It has been decided that the bankrupt is bound to see that the proceedings are regular, and if they are not so, he cannot have his discharge. But the courts that have made this law, without much aid from the statute, must construe it reasonably. The bankrupt ought not to be held responsible for all the shortcomings of his assignee, over whom the statute gives him no control. If the latter had neglected his duty in accounting for assets, or in recording his assignment, or in any other matter which relates only to the proper discharge of his trust, and not to the essential validity of the proceedings, that is a matter which the creditors and the courts can take care of. Where there

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is any failure of jurisdiction, as where, by mistake, the case had been conducted by the wrong register, I have refused the discharge. So, probably, as matter of practice, the meetings must be duly warned, and held before the discharge can be granted, because the act intends that the creditors should have due and full opportunity to meet and consult before the proceedings are closed. This is fairly to be inferred from the whole scope of the act. But I am not able to see that the publication by the assignee of his appointment is essential to the regularity of the proceedings. It is directory to the assignee, and not intended so much for creditors as for persons owing debts to or otherwise having business with the estate. Creditors whose names may be omitted from the schedule are cared for in the provision for publishing notice of the warrant and of the meetings.

The next two specifications are, that the second and third meetings were not held immediately upon the expiration of three months and six months, respectively, after the adjudication was made; and that the omission was not without the fault of the assignee. The language of the statute on this head is certainly somewhat peculiar. The meetings are to be held at the expiration of three months and six months, or earlier if practicable; and "if by accident, mistake, or other cause, and without fault on the part of the assignee, either or both the second and third meetings should not be held within the times limited, the court may, upon the motion of an interested party, order such meetings, with like effect as to the validity of the proceedings, as if the meeting had been duly held." It is impossible to understand all the provisions of the bankrupt act without recollecting that it was borrowed in large part from the well-matured systems of Massachusetts and of England; and that, in adopting it, some discrepancies have crept in. Now, by the law of Massachusetts, it was at one time essential that the second meeting should be held not more than three months after the date of the warrant, and it was only at that meeting that the insolvent could take the prescribed oath or obtain his certificate. Afterwards, the oath was to be taken at that meeting, and the certificate was to be granted at the third meeting, which, too, was to be held within a given time after the appointment of the assignee. It consequently sometimes happened that the debtor lost

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his right to a discharge, by the neglect of his assignee to call those meetings in season. This law was afterwards modified in some respects, and in 1854 the legislature passed an act, which is now incorporated in the general statutes of the State, ch. 118, § 73, precisely like the above-cited provision of the bankrupt act, excepting that it is general, and not confined to cases of "accident and mistake." A comparison of its language with that of the bankrupt law shows clearly that the latter was copied from it. By the bankrupt act, however, there was no necessity for any such clause; because it is not essential that the second and third meetings should be held at any particular time, but only that they should be held *at the expiration of three months and six months*; and unless this means on the very day that the months run out, there is no day on which it can be said that it is too late to hold these meetings, unless possibly it may be said that the second meeting should be called before the end of six months. Nor does the bankrupt law require that the necessary oath should be taken, or the discharge be granted, at one of these meetings, or that their being held at any particular time should be in any way essential to the validity of the proceedings. So that, although it is the duty of the assignee to call the meetings at the expiration of the time mentioned,—and he may be required to do so, and may be held responsible for any neglect,—yet neither the debtor's discharge nor any thing else touching the regularity of the proceedings depends upon their being held on the days that these months respectively expire. And if they are not held, any creditor, or the debtor, may call upon the court to require them to be held, though it may have been the fault of the assignee that they were not sooner called. Else it would be in the power of the assignee to take advantage of his own neglect, and to defer indefinitely the accounting which the law requires of him at those meetings. But if all this is wrong, yet, the meetings in this case having been called by order of court, it must be presumed that good cause was shown for their being called when they were.

The next specification is that the debtor refused to submit himself to examination as required by the act. The fact is that the debtor was summoned before the register to be examined, and made some objections which were referred to the court, and overruled; and the creditor, who is the same now objecting, never

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pressed for a further hearing. He now takes the position that it was the debtor's duty to notify him when and where the examination would be proceeded with. This is a mistake. It was for the creditor to examine the debtor, if he desired to do so ; and to see that due appointments were made with the register for that purpose, and to give the other party notice of them. The debtor's duty was performed when he was ready to be examined upon due notice ; and the evidence shows that this debtor was ready. Whether if a bankrupt being present at a legal hearing, refuses to be examined, without good cause, there is any remedy except by motion to commit, I need not now decide.

The only other specification which the evidence makes important is the ninth, that the bankrupt did not, after the passage of the act and before filing his petition, keep proper books of account. It seems that the debtor was engaged in a variety of schemes, none of which was successful. Among other things, he kept a wharf, where he sold wood and coal. His books of this business were kept by a skilful clerk, but there was, during the last part of the time, no cash account whatever, and this by the bankrupt's own act. I regret to be obliged to decide that for this omission the bankrupt must be held to come within the penalty of the statute. A cash account is necessary to an understanding of a trader's business, and it has been decided by two courts that the want of it is fatal under this act. The specification is very general, and I thought at first that it might be held insufficient ; but, upon the hearing, I could not see that any injustice would be done by admitting the evidence. If the objection were that certain entries were wanting, or that there were irregularities in the mode of keeping proper books, they ought to be pointed out in the specifications ; but where the objection is that a cash account, which all traders should keep, is wholly wanting, it seems to me that the general specification is enough. Besides, an amendment in so simple a matter ought not to be denied. *Discharge refused.*

C. Lamson, for objecting creditors.

J. C. Perkins, for the bankrupt.

On an application to the circuit court for the exercise of its supervisory power, the bankrupt represented that he could now prove that he had kept a cash-book. That court refused to interfere on such a ground, but intimated that this court might do so ; and on a rehearing here the discharge was granted.

Re Keach.

Re WILLIAM KEACH.

JUNE, 1869.

Where one had carried on a small trade wholly for cash, and had discontinued it for some months before his bankruptcy, and there was nothing in the way of debts, assets, or capital outstanding; *held*, his failure to keep proper books of that trade would not prevent his discharge.

The fact that there was nothing connected with his old trade remaining of interest to his creditors in bankruptcy can be proved by other evidence than that of the books themselves.

LOWELL, J. The only question remaining for judgment is whether the bankrupt has failed to keep proper books of account within the meaning of the act. It seems that during the winter of 1867-8, he carried on for a few months a cash business at the town of his residence in buying wood by the car-load, and sawing and splitting it for sale to his neighbors for firewood. He says he had no occasion for any books, and kept none. He gave up the business some considerable time before he applied for the benefit of the act, and it is stated, and not denied, that there was nothing left outstanding, either in the way of assets or of debts or credits, that could affect the proceedings here. While I cannot doubt that the bankrupt was a tradesman so long as he carried on this business, yet I am of opinion that the strict and somewhat harsh rule of the bankrupt law concerning the keeping of books ought not to be extended to his case. The purpose of the act is to give to the assignee and the creditors full and authentic information of the state of the bankrupt's business; and it being presumed by congress that merchants and tradesmen ought to be able to keep books of account, it requires them to do so if they would avail of the full advantages of this law. But if the business has been wholly closed, so that no rights or interests can be subject to examination or decision in the bankrupt court, and neither debtors nor creditors remain, and the business was one which neither required nor received the use of any capital, so that there is nothing in it which can concern the assignee, or which the books could show him to his advantage, it seems to me that such past trading is not within the equity of the statute. And it is, perhaps, not within its letter, because it may well enough be said that he is not now

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a merchant or tradesman. It may be contended that the books themselves are the only proper evidence that the business is thus wholly closed and past. There would be great force in this suggestion as applied to any facts which could be shown to be of interest to the assignee; but the mere fact that there is nothing in the books which concerns him, and would have been nothing, however well they might have been kept, may be proved *aliunde*. The schedules and proofs of debts, and all the proceedings in the case, tend to show that fact, and may be admitted for that purpose.

That the trading has ceased or been suspended is not material; but when nothing of it remains to be disposed of, it is hardly right to consider the bankrupt to be a merchant or tradesman within the statute any more than if he never had been such. His trading, and his neglect to keep books, are alike immaterial to his present creditors and their representative, the assignee.

I have been obliged, by my view of my duty, to refuse a discharge to some merchants and tradesmen, who seemed to me not to have complied with the law. I have done so reluctantly, where no intentional fraud was shown; and I am not sorry to be able to say, that I do not find this bankrupt to be a merchant or tradesman within the fair construction of the act of congress.

Discharge granted.

L. Mason, for the opposing creditor.

J. B. Goodrich, for the bankrupt.

W. J. FORSAITH v. GEORGE MERRITT & AL.

JUNE, 1869.

The assignee in bankruptcy of one partner cannot set aside a conveyance made by both partners with intent to prefer a joint creditor, the other partner not being bankrupt.

The payment of a joint debt does not become a voidable preference unless the debtors both become bankrupt within the time limited by the statute.

The assignee of one partner becomes a tenant in common with the other partner, and his equities depend on the title of his assignor.

BILL IN EQUITY by the assignee of Charles A. Church, alleging that said Church and Amos M. Farnum, both now of Boston, were

copartners doing business in Chicago from December, 1867, to June, 1868; that on the fourth day of the latter month they were insolvent and dissolved their partnership, and on the same day made a conveyance of nearly all their joint personal property to the defendants, George and John Merritt, who were creditors of the firm, and had reasonable cause to believe them insolvent; that within four months afterwards the said Church was declared a bankrupt in this district, upon his own petition, and the complainant has been duly appointed assignee of his estate. The bill made the former partner, Farnum, a defendant, and prayed for an account of the partnership dealings, and that the conveyance may be set aside. The defendants severally demurred to the bill.

LOWELL, J. This is a case of new impression. The plaintiff who is the assignee of one partner seeks to set aside a preference given by both to a joint creditor. There is a suggestion of Mr. Justice Story that in some cases the court may require the partner who is not in bankruptcy to deliver up the joint assets (*Parker v. Muggridge*, 2 Story, 334), and Judge Ware acted on this intimation, and decreed to the assignee the possession of joint books and accounts which were in the possession of the insolvent partner, who was not a technical bankrupt: *Ayer v. Brastow*, 5 Law Reporter, 498. But I have seen no case which decides that a preference by two partners can be avoided by the assignee of only one of them. A preference is valid at common law and in equity, and is voidable only by an assignee in bankruptcy, and only when the proceedings in bankruptcy are begun within four months, or according to another construction of the statute, within six months after the act is committed; but in this case the defendant, Farnum, has not become bankrupt, and six months have elapsed, so that it is conclusively settled that there has been no joint preference. Now the assignment does not vest the joint property in the assignee of one partner, and he cannot sue for it without joining the other partner: *Eckhardt v. Wilson*, 8 T. R. 142. It does not dissolve an attachment of joint property theretofore made at the suit of a joint creditor: *Fern v. Cushing*, 4 Cush. 357. The equities of the separate assignee must be worked out through the title of his assignor. The decision of Judge Ware was founded on the equity which each partner has, to see that joint creditors are paid *pro rata*; but a partner has no equity to set aside his own conveyances.

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I am not now dealing with the right of a separate assignee to recover the bankrupt's interest in joint property conveyed by a joint fraud, or to recover his share in a surplus. What I decide is that here was no joint fraud, because a preference is only fraudulent *sub modo* and on condition that the grantors become bankrupt within four or six months, and the bill clearly shows that there was no surplus.

If the facts are truly alleged in the bill the joint creditors should have taken care that both partners were adjudged bankrupt, within the time limited by the statute. As they have not taken this course, I must infer that they did not think it worth their while to interfere with what, in the absence of bankruptcy, is only the payment of a just debt.

So far as the bill seeks an account from Farnum of the partnership affairs, it is demurrable only on the ground of multifariousness and misjoinder, and may, perhaps, be amended on proper terms, by striking out all other matters after the defendants George and John Merritt have been dismissed. *Demurrer sustained.*

W. A. Herrick & W. J. Forsaith, for the plaintiffs.

H. A. Clapp, for the defendant.

CIRCUIT COURT.

JOHN W. LIGHTNER v. THE BOSTON AND ALBANY R. R. CO.

JUNE, 1869.

The Boston and Worcester Railroad Company was consolidated with the Western Railroad Corporation under authority of an act of the legislature of Massachusetts, which vested in the new corporation called the Boston and Albany Railroad Company, all the powers, rights, franchises, &c., of the old corporations. *Held*, the new corporation might lawfully use a patented axle box which both the old corporations had been licensed to use.

CASE FOR INFRINGEMENT OF A PATENT. — By an agreed statement of facts it appeared that the plaintiff was the patentee of a certain improvement in axle boxes for railway cars, and that his letters-patent were extended for seven years from November 19, 1862; that he afterwards granted licenses to the Boston and Worcester and Western Railroad Corporations, respectively, to use

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provement on all cars belonging or which might thereafter to said corporations. The defendant corporation was formed consolidation of those two companies under the provisions of of the legislature of Massachusetts passed in 1867,¹ since licenses were granted. The questions presented were whether licenses authorized the defendants to use the invention on cars formerly belonging to the old companies and on those made by defendants since the union, or either of them.

The legislature of Massachusetts, by the act already referred to, authorized the Western Railroad Corporation, whose road then extended only to Worcester on the east, the right to buy the road and franchise of any other railroad ending in Boston, or to merge and consolidate its stock with any other such company, and to merge with the Worcester Railroad Company, or to make a new independent line of railroad from Worcester to Boston. And it was ordered that if a consolidation should be made, the new corporation should have, hold, and enjoy all the powers, rights, privileges, franchises, property, claims, demands, and estates which at the time of the union were held and enjoyed by either of the then existing corporations.

J. Maynard, for the plaintiff. It is not disputed that upon the union being made there vested in the new corporation, by virtue of the act, all the property, &c., which was in its nature capable of assignment, as, for instance, the cars themselves to which these licenses were attached; but the right to use the improvement could not pass by any grant legislative or other, because that right existed in each licensee as a distinct legal entity, and was not capable of transmission.

S. Hale, for the defendants.

WELL, J. A mere authority to use a patented invention will in many ways and perhaps not usually be transferable. Whether it is or not will depend in each case on the terms or nature of the act. The authority given by the licenses produced in evidence is to all cars which either of the companies might find it necessary or convenient to own, wherever they might use them, and to use even of the unlicensed cars of others, so far as any defense against these companies is concerned, upon the licensed roads

¹ Ch. 270.

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respectively; reserving a right to sue unlicensed owners of cars, but not to enjoin their use upon the licensed roads.

The gist of this contract clearly is an unlimited use on the roads from Boston to Albany without interruption, and the use of an unlimited number of cars *bond fide* owned by the companies. There is nothing personal in all this, not even a reliance on the personal credit of the licensees, for the consideration was money paid down. I cannot see that the union of the two lines under one management can affect the plaintiff unfavorably. Indeed it was admitted at the argument that the use was not changed. The nearest analogy that I can think of is that of two persons, each authorized to use the invention, becoming partners and using it jointly in precisely the same business as before. Can it be contended that such a use would be unlawful, and that the two could be enjoined from doing what either alone might do? It is true that the defendant corporation is distinct from either of its component corporations, but that is a mere matter of detail and convenience. The old corporations have never been dissolved, and might well enough be held to exist for all purposes for which their continuance is necessary, as indeed the statute says they shall continue for certain purposes.

The license to the Western Railroad Corporation appears to contemplate a state of things analogous to what now exists; for it stipulates that the licensee may use the invention on all roads, "that may be operated by said company, or may hereafter be constructed, owned, used, or leased by said company."

Upon consideration of these contracts, I hold that they are transmissible by succession to a corporation formed of a union of the two licensees, and succeeding to the rights, duties, and obligations of both.

Judgment for the defendants.

DISTRICT COURT.

Re J. F. GILBERT.

JULY, 1869.

It is the intent of section 26 of the bankrupt act, that the bankrupt should be examined as to all his dealings, &c., but not that he should be examined by each separately. It is therefore the practice to require the assignee to

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it that the first examination is thorough and complete, and it is not the practice to grant a second order for examination except for cause.

And for like reason the order is not passed before the appointment of the assignee without special cause.

The bankrupt's wife may be required to testify to all facts and transactions to which she was either a party or a witness, but not to mere confessions or admissions of her husband concerning his dealings with third persons.

Third persons are required to submit to examination only on cause shown by affidavit.

A CREDITOR having applied for leave to examine the bankrupt and his wife, the practice of the court was thus stated by

LOWELL, J. The twenty-sixth section of the act gives the court power to require the bankrupt to attend and be examined at any time, on reasonable notice, upon the application of the assignee or of any creditor, or without any application. This devolves upon the court not merely a power, but a duty, to order the examination when it shall be shown to be proper, for the due administration of the estate. Our practice is to order one examination of the bankrupt, as of course, upon the application of the assignee or of any creditor who has proved his debt. But that the bankrupt may not be harassed by vexatious applications, the rule is, that this first examination shall extend to all matters concerning which any person interested wishes to inquire. To this end, if a creditor makes the application, he is to notify the assignee of the time and place appointed, and the assignee is to notify all other creditors who, so far as he is informed, have any wish to examine the bankrupt, and is to see to it that this hearing is thorough. Any person interested has the right to take up the examination when the person who first makes it has finished, and so throughout, subject to the supervision and control of the register as to the details. No other application will be granted, except for cause. For a like reason, an examination will not be ordered before the appointment of the assignee, excepting for cause. These rules have been found to work well for all parties, and will be adhered to.

The same section authorizes the court to require the attendance of the wife, and her examination as a witness, for good cause shown. It has been a matter of considerable doubt with me what cause is sufficient for the passage of such an order. Without professing to have fully resolved this doubt, I have determined upon the whole that the statute intends to make the wife a witness to facts within her own knowledge, and more especially to transac-

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tions in which she has been a party, but not to mere confessions or admissions of her husband, made in the confidence of the conjugal relation, concerning his dealings with third persons. I cannot bring myself to believe that congress intended to destroy this most sacred of all confidences. I have therefore passed the order only when it has appeared by affidavit that the wife has been a party or a witness in the matters proposed to be inquired about; and the subject-matter is to be set forth in the order for the guidance of the parties in the examination.

A like practice prevails in respect to the examination of third persons under the general words of section twenty-six. It must be shown by affidavit that there is cause to believe that they can disclose something beneficial to the creditors, and they are to be examined only on the subjects specified.

In this case, it is shown that the wife professes to be a creditor of the estate, and she may therefore be examined as fully in regard to her supposed debt as any other creditor might. This I consider the true purpose of the statute. *Order accordingly.*

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JULY, 1869.

The statute of Massachusetts of 1847, ch. 234, § 2, requiring vessels in Boston harbor to rig in their jib-booms in certain cases, is valid, and binds all persons navigating that harbor.

A vessel whose jib-boom is standing contrary to the law must be held liable for a collision which happens in part or in whole by reason of the neglect.

Where a tug in such a case knowing the position of the first vessel, collided with her, when by the exercise of ordinary skill and care she might have avoided her, the tug must bear one-half of the damage.

THE tug-boat Clover was engaged to tow the bark Sarnia from Clark's wharf in East Boston to another part of the same harbor. The bark was not fully rigged nor manned, and the whole movement was conducted by the master of the tug-boat, and no question was made that if either the tug or the bark was liable for the consequences of the collision which ensued, it was the former.

The Sarnia was lying on the south side of the wharf with her bows up the dock, which was about one hundred and sixty feet wide. Across the end of the next wharf lay the bark Lord Palm-

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erston, discharging into lighters, and with the extreme end of her jib-boom extending about seventy feet into the dock between the two wharves, thus leaving about ninety feet width of dock free for moving the Sarnia. The tug made fast to the port quarter of the Sarnia, and her master ordered the bow line of the Sarnia to be cast off; he then towed her stern a few feet beyond the edge of the wharf and cast off her stern line, and then went on at full speed. Finding that the Sarnia was sagging down with the tide and wind more than he had expected, and fearing that a collision with the Lord Palmerston was inevitable, he let go his tow-line to ease the shock, and the Sarnia drifted into the other bark and carried away a part of her jib-boom. He testified that the collision would not have happened if he had kept on.

A statute of Massachusetts enacts that the master, &c., of every vessel shall, as soon as practicable, after having hauled to the end of any wharf that extends to the channel in said harbor, cause her lower yards to be cockbilled and her jib-boom to be rigged in, so that said jib-boom may not annoy any other vessel going in or out of the adjoining docks, &c., under a penalty not exceeding ten dollars: Stat. 1847, ch. 234, § 2.

R. H. Dana, Jr., & L. S. Dabney, for the libellants.

1. The statute does not apply to us. The claimants have not shown that this wharf extends to the channel, nor that our jib-boom did "annoy" vessels going in or out of the dock.

2. Even if we violated the statute we can recover. The cases of *Arundel v. McCulloch*, 10 Mass. 70, and *Garey v. Ellis*, 1 Cush. 306, were decided at common law, and besides turned on the fact that the wharf and bridge were obstacles to navigation. Here there was ample room to pass, and the law of admiralty is that a vessel which is out of her proper place must not be run down, but must be avoided if possible: *The Bay State*, 3 Blatch. 48; *The Batavier*, 4 Notes of Cases, 356; *The Dura*, 5 Irish Jur. 384; *Phil. &c. R. R. Co. v. Phil. &c. Towboat Co.*, 23 How. 218; *The Marcia Tribou*, 2 Sprague, 17; *Butterfield v. Boyd*, 4 Blatch. 356; *The Telegraph*, 8 Moore, P. C. 167. And even at common law the modern doctrine is that an individual cannot abate a public nuisance unless such action is necessary for his reasonable use of the public way: *Dimes v. Pelley*, 15 Q. B. 276.

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G. O. Shattuck, for the claimants.

1. This wharf extends to the channel line of Boston harbor, as shown by the statutes establishing that line. No other evidence is necessary.

2. State statutes which establish harbor regulations are constitutional and binding on all vessels resorting to the harbor: *The New York v. Rae*, 18 How. 225, per Nelson, J.

3. The violation of the statute is a fault for which the libellants are responsible, and it was one which contributed to the collision: *Waring v. Clark*, 5 How. 465, per Wayne, J.; *The John Fraser*, 21 How. 184; *Chamberlain v. Ward*, ib. 565; *The Scioto*, Daveis, 359; *The John Adams*, 1 Clifford, 413.

4. We say the jib-boom was a nuisance, and if, in the exercise of ordinary care and skill, we accidentally and not wilfully ran against and injured it, the owner has no remedy: *Brown v. Perkins*, 12 Gray, 89; *Arundel v. McCulloch*, 10 Mass. 70; *Mayor of Colchester v. Brooke*, 7 Q. B. 336.

LOWELL, J. Although the damage is small which is sought to be recovered in this proceeding, the parties have thought the points of law sufficiently important to warrant a careful and learned discussion. They are not altogether new to me, and I have given them renewed attention in the light of the arguments. The cases cited appear to establish the proposition that the States may lawfully make regulations concerning the harbors within their limits, and not repugnant to any act of congress, which will be binding on all persons resorting to them for trade. The libellants having failed to comply with such a regulation are in the wrong, if their delinquency caused or aided in causing the collision. The words "so that the said jib-boom shall not annoy" other vessels, do not qualify the express command to rig in the jib-boom, but only explain its purpose, or at most limit the law to those cases in which the jib-boom might possibly or probably interfere with navigation. The collision in this case, which was solely with the jib-boom, sufficiently shows that annoyance was to be apprehended, and that the fault of the libellants contributed to the result.

But the fault of the libellants does not excuse any want of due care and skill on the part of the tug. The doctrine of nuisance has little application here, because, in this case, the true mode of

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abating the nuisance, if it were one, would be to move the ship, which the evidence clearly proves could have been done in a few minutes and with great ease, by simply letting her drop down with the tide. The master of the tug testified that on former occasions a request for such a removal had sometimes been refused, but it is not fit that the rights of the libellants should be forfeited by the former misconduct of strangers. The tug, therefore, must share the loss, if the want of care or skill of her master contributed to the disaster. It was daylight, the state of the wind and tide, and the width of the dock were all patent, and no reason is given for the collision but the miscalculation of the master. Though he is a man of undoubted skill and prudence, yet it is plain that he did not, in this particular case, take all necessary and proper measures for safety. The theory of the defence is that the only mistake was in not keeping on at full speed; but this mistake would have been avoided by having a competent lookout on board the *Sarnia* to report whether she was dangerously near the *Lord Palmerston*. Instead of this the master trusted to his own more distant observation, and ran into unnecessary danger. Two cases in Judge Sprague's reports closely resemble this. See *O'Neal v. Sears*, 2 Sprague, 52, and *The Marcia Tribou*, ib. 17. The ground for holding the libellants to bear a part of the loss is that by their illegal conduct they diminished the width of the dock; and the claimants are liable because, taking the dock as it was, they might by competent skill have taken the vessel out without damage to the *Lord Palmerston*, though not as easily as if the law had been complied with by the latter vessel.

Decree accordingly.

Ex parte THE ROCKFORD, ROCK ISLAND, AND ST. LOUIS RAILROAD
Co. — *Re* NATHANIEL MCKAY & AL.

JULY, 1869.

Assignees in bankruptcy stand no better than the bankrupts in respect to the assets excepting in cases of fraud or of attachments of less than four months' standing. Where, therefore, the bankrupts, manufacturers of locomotive engines, would have been estopped to deny that a particular engine in their shop was the property of a particular customer, the assignees will be equally estopped.

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Where the manufacturers obtained their pay for an engine, on the false representation that it had been finished and delivered to a carrier to be delivered to the customer, and they afterwards built such an engine as had been ordered, and marked it with the customer's name, but had not sent it from the shop at the time of their bankruptcy; *Held*, that the customer had acquired a title to the engine by estoppel, which he might enforce against the assignee in bankruptcy.

PETITION that the assignees of the bankrupts be required to deliver an engine in their possession. The bankrupts, through McKay, the business partner, who did all the acts, and conducted all the correspondence hereinafter mentioned, made an oral contract in the city of New York, on or about the first of September, 1868, to build a locomotive engine for the petitioners, a railroad corporation established in the State of —, whose principal business office was in the city of New York, where Mr. Boody, their treasurer resided. The terms of the contract were not very fully disclosed by the evidence, but from the subsequent dealings of the parties, it is to be inferred that the engine was to be finished as soon as practicable, and dispatched to the road of the petitioners, and to be paid for in cash at the same time. On the third of September, the bankrupts wrote to the president of the company that they were at work on the engine, and would finish it with all possible dispatch. On the third of November, they wrote to the treasurer that they had drawn on him at sight for \$9000, as the amount due for the engine, and had forwarded the receipt and invoice. This paper, called receipt and invoice, was not produced, but it appears by the correspondence to have been a paper purporting to be signed by a transportation company for the delivery of the engine at Cedar Rapids. Mr. Boody replied on the next day that he had received and paid the draft, but that there was a mistake in the bill of lading, which should have been for Chicago instead of Cedar Rapids. The bankrupts replied on the next day that they had corrected the mistake, and had ordered the engine to be sent to the proper address. On the fourth of December, Mr. Boody wrote that the engine had not yet arrived, and asked McKay to trace it and hurry it forward. On the 14th he wrote again, and complained that six weeks had passed since the engine was shipped, and it had not arrived, and that he thought the transportation company were liable in damages. On the same day, McKay & Aldus wrote him that they had had some

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trouble in their business, which had caused the delay; that this was now all over, and the engine would go forward the next day. December 15, Mr. Boody replies: "I am glad to be informed that our engine will go forward to-day. I am at a loss, however, to understand how trouble in your business should affect the delivery by the Sol. Tr. Co. of an engine receipted for by them six weeks ago, and which was in no sense whatever *your* property." At what precise time this letter was mailed did not appear. On the same day, McKay & Aldus filed their petition in this court on which they were adjudged bankrupts; and this proceeding was against their assignees, to have the engine delivered up to the railroad company. It appeared at the hearing that McKay & Aldus had not finished this engine on the fourth of November, and, indeed, that it did not then exist as an engine; and it did not appear that they then had any engine corresponding to the order, or that any was ever delivered, formally or otherwise, to the transportation company. During November they were at work on two engines, precisely alike, either of which would have answered the contract. When the first was nearly finished, Mr. McKay at one time expressed an intention to send it to the petitioners, but did not do so, and delivered it to the Hartford & Erie Railroad Company of Boston. The engine now in question was afterwards proceeded with rapidly, and was known in the shop as the Boody engine, and was marked with the name of the petitioners. On Saturday, the 5th December, it was within a few hours of completion, and would have been finished that day, and shipped on the Monday following, but for an injunction which was issued out of this court upon a petition of creditors asking for an adjudication of bankruptcy against the firm. On the 14th day of December, the petitioning creditors' attorney agreed with the attorney of the bankrupts that the injunction should be so far modified as to release this engine, and it was then finished, or substantially so; but afterwards a creditor attached it, under the State law, and it could not be shipped. After the voluntary petition was filed, the proceedings *in invitum* were given up, and the assignees were elected under the former, so that their title related to the 15th of December. After the bankruptcy, and before the appointment of assignees, Mr. Boody's son came to Boston and demanded the engine, by the

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authority and in the name of the petitioners, but was not allowed to take possession of it.

H. W. Paine, for the petitioners.

D. Foster, for the assignees.

LOWELL, J. The question presented is, whether the title to this chattel is in the petitioners or the respondents. The assignees of McKay & Aldus have the same rights, and no more, as the bankrupts had. They take subject to all liens, incumbrances, and equities, in the same manner as executors, excepting that, by the terms of the statute, liens by attachment are dissolved unless they have been standing for four months, and that assignees may set aside all conveyances made in fraud of the general body of the creditors. The question, therefore, is whether, as between the bankrupts and the petitioners, the title had passed on the 15th of December. The property in a chattel passes whenever, by a valid contract, the owner undertakes that it shall pass; but the chattel must be in existence, and must be capable of being distinguished from other like chattels, before the title will change, because until that time there is no definite subject upon which the contract can operate. In the case of a contract to manufacture a chattel, the general rule is, that the property does not pass until it has been finished, and until the maker has in some manner appropriated it or set it apart for the particular customer, and the latter has accepted it. It is said that until this is done, the manufacturer, on the one hand, may deliver the article to any other customer, and the purchaser, on the other hand, may reject it if it do not conform to the order. The question in the late cases has therefore been of a definite appropriation on the one side, assented to on the other: *Carruthers v. Payne*, 5 Bing. 270; *Wilkins v. Bromhead*, 6 M. & G. 963; *Elliott v. Pybus*, 10 Bing. 512; *Rhode v. Thwaites*, 6 B. & C. 388; *Benjamin on Sales*, pp. 260, 268, 270. Every thing depends, however, on the contract, and if the parties choose to agree that the property shall pass before the work is complete, they can do so; and this may be implied as well as expressed. Thus in those cases of ships paid for by instalments, of which *Woods v. Russell*, 5 B. & A. 942, was the first, such an inference has been derived from the mode of payment and other circumstances; and however any of those cases may have been


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criticised, they are not open to any just remark in matter of principle, but only upon the propriety of its application in the particular case. The agreement to pass the title may have been inferred too hastily, but the competency of the parties to make such an agreement cannot be questioned. There may be cases, of course, in which the manufacturer would have no right to appropriate the goods to another customer, as in the instance of a portrait painted to order; and there may be others where the purchaser may have waived his right to reject the article, and have left it to the judgment and honesty of the maker to comply with the terms of the bargain. If both these elements concur, there is no reason why the property should not vest in the purchaser on the completion of the work. It is not denied, that if this engine had been made on the fourth of November, the title would have passed; but it is said the minds of the parties never met in relation to this identical engine. It may be maintained with some force, that the petitioners having been induced by the misrepresentation of the bankrupts to accept the chattel before it was finished, that when it was finished, and the petitioners were notified that it would be sent away, the title was complete by relation to the former acceptance.

But there is another view which seems to me to establish a title in the petitioners by estoppel. The bankrupts and their assignees cannot deny that there was an engine finished and set apart for these petitioners, and paid for by them early in November. Here is such an engine. If this is not the engine referred to in the correspondence, it is for them to show the other which was. Suppose the bankrupts had never built any other engine like this, would they not be estopped by their acts and correspondence to deny that this chattel was complete on the fourth of November? The fact that there were two chattels precisely alike does not embarrass the case at all. If, when both were in the bankrupts' machine shop, the petitioners had demanded one in particular, the bankrupts could not have been permitted to say that neither had been appropriated to this contract, because it was on the distinct statement that one had been appropriated, by being pointed out and delivered in some way to the transportation company, that they had obtained payment of the price; and so, to defeat an action for the one, they must have been able to show that it was the other that was so

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appropriated. This they cannot do here, for the contrary is the truth. The argument was, that the estoppel could not apply to a chattel not *in esse* when the misrepresentation was made. But the foregoing consideration appears to be a sufficient answer, namely, that the assignees are estopped to say that it was not *in esse* unless they show some other engine to which the representation applied.

Petition granted 

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The case of *Pratt v. Reed*, 19 How. 359, discussed.

If it be necessary for libellants to show that the owners of a vessel were not in good credit at the time the supplies were furnished, evidence that the vessel was attached for a common-law debt of the owners in a foreign port, and that they did not dissolve the attachment, and that the master, who was a part-owner, was obliged to mortgage his share of the vessel to procure her release, is sufficient proof of a want of credit.

If a vessel is attached in a foreign port in a suit at common law against the owners, money advanced to pay this debt does not constitute a lien on the vessel, although the owners had no funds, and the master could obtain the release of the vessel in no other way.

The taking of a mortgage by persons furnishing supplies as collateral security does not prevent their enforcing the lien given by the maritime law.

Money advanced to pay a debt which is a lien on the vessel, constitutes a lien.

A stevedore has no lien on a vessel.

The decision in the case of *The Antarctic*, 1 Sprague, 206, as to appropriation of payments, does not apply to a running account, and require the creditor to satisfy all the items for which he has no lien. In such a case the law will appropriate the payments to the items in the order of their dates.

SUPPLIES FURNISHED A NOVA SCOTIAN VESSEL IN NEW YORK.—The vessel was attached in New York in a suit in a common-law court for a debt of two of the owners. The master, who was owner of one-third of the vessel, after writing to his owners and finding that they could do nothing to release the vessel, borrowed a sum of money from the libellants to pay this common-law debt, and gave a mortgage upon his share of the vessel to secure this sum, and also to secure them for supplies which they were to furnish the vessel to enable her to go to sea.

¹ Reported by John Lathrop, Esq.

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These supplies were furnished, and supplies were also furnished at subsequent times on different voyages. The master from time to time paid the earnings of the vessel to the libellants who gave him credit on account. The vessel was afterwards proceeded against *in rem* in Boston, and mortgagees of the shares of the vessel not owned by the master appeared as claimants. The vessel not being released on bail, and no security for her value being given, she was sold by order of court under the eleventh admiralty rule and her proceeds paid into court.

John Lathrop, for the libellants.

1. The libellants are not bound as a part of their case in chief to prove that the owners of the vessel had no credit in New York, and that the supplies could not have been obtained upon their personal credit. The interpretation put upon the case of *Pratt v. Reed*, 19 How. 359, by Judge Sprague in *The Sarah Starr*, 1 Sprague, 453, and since followed by this court, is erroneous, and the court is respectfully asked to reconsider it. In *Pratt v. Reed*, there was no evidence that the coal had been supplied on the credit of the vessel, and the libel was properly dismissed. The term "necessity for a credit," which is used by the court in that case, has been interpreted to mean that the libellant must, in the first instance, show that there was such a necessity, and that the owner had no credit. By the law, as it was understood before *Pratt v. Reed*, a necessity for a credit was presumed. The libellant started with this presumption. The claimant of the vessel might rebut it by showing that the master had funds which he ought to use and that the lender knew it, or that the master was guilty of fraud and the lender connived at it. It is true that the court in *Pratt v. Reed* said: "But the more serious difficulty in the case on the part of the libellant is the entire absence of any proof to show that there was also a necessity, at the time of procuring the supplies, for a credit upon the vessel." This may refer to the libellant's evidence in chief, or to his evidence in reply. If to the former, the case has changed a well-established rule of law. If to the latter, no change has been made. That this form of expression does not necessarily denote that the evidence in chief was meant, is conclusively shown by the language of the court in a case decided at the same term: *Thomas v. Osborn*, 19 How. 22, 31.

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In that case the rule is thus stated by Mr. Justice Curtis: "To constitute a case of apparent necessity, not only must the repairs and supplies be needful, but it must be apparently necessary for the master to have a credit to procure them." If the learned judge had stopped here, it might well be argued that the libellant must show the necessity for a credit in the first instance, but he continues: "If the master has funds of his own which he ought to apply to purchase the supplies which he is bound by the contract of hiring to furnish himself, and if he has funds of the owners, which he ought to apply to pay for the repairs, then no case of actual necessity to have a credit exists. And if the lender knows these facts, or has the means, by the use of due diligence, to ascertain them, then no case of apparent necessity exists to have a credit, and the act of the master in procuring a credit does not bind the interest of the general owners in the vessel." This is but a statement of the rule laid down in the case of *The Aurora*, 1 Wheat. 96, 103, where Mr. Justice Story said: "No presumption should arise that such repairs and supplies could be procured upon any reasonable terms, with the credit of the owner, independent of such hypothecation. If, therefore, the master have sufficient funds of the owner within his control, or can procure them upon the general credit of the owner, he is not at liberty to subject the ship to the expensive and disadvantageous lien of an hypothecatory instrument." Here is a clear recognition of the rule that there is no presumption that supplies or repairs can be procured on the credit of the owner, and that this must be shown as a matter of defence. From all these cases it is submitted that the term "necessity for a credit" means merely that if the master has funds and the lender or person furnishing supplies knows it, this may be shown in defence. See *The Virgin*, 8 Pet. 554; *The Neversink*, U. S. C. C. New York, Nov. 1867;¹ *The James Guy*, same court, Sept. 1867;² s. c., before Judge Benedict, 1 Bened. 112; *The Belfast*, U. S. Supreme Court, December term, 1868.³

¹ Since reported, 5 Blatchf. J., 539.

² Since reported, 5 Blatchf. J., 496.

³ Since reported, 7 Wallace, 624. See also *The Grapeshot*, 9 Wallace, 129.

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2. That the owners of the vessel had no credit is fully proved.

3. The money advanced to pay the debt of the owners of the vessel and to release her from arrest constitutes a lien. If the money had not been advanced the vessel must have been sold in New York. See *The St. Jago de Cuba*, 9 Wheat. 409. The master might have given a bottomry bond to release the vessel from arrest: *The Vibilia*, 1 W. Rob. 1; *Smith v. Gould*, 4 Moore, P. C. 21; *The Edmond*, Lush. 211, 220.

4. The lien was not waived by the taking of collateral security: *The Kimball*, 3 Wallace, 37; *Carter v. Sch. Byzantium*, 1 Clifford, 1; *The St. Lawrence*, 1 Black, 532; *The Nestor*, 1 Sumner, 80, 85; *The St. Mary*, 2 Blatchf. 329; *The West Friesland*, Swabey, 454; *The James Guy*, 1 Bened. 112.

5. Money advanced to pay for supplies constitutes a lien: *Thomas v. Osborn*, 19 How. 28.

6. Stevedore's bills constitute a lien: *The Medora*, 1 Sprague, 139; *The Circassian*, 1 Bened. 209. In the latter case such a claim would have been allowed had it not been for two cases which were considered as precedents the other way, viz.: *The Amstell*, Blatch. & H. 215; *The Joseph Cunard*, Olcott, 120. The *Amstell* was decided on two grounds, 1st. That the labor was performed partly on land and partly on board the vessel; 2d. That credit was not given to the vessel. The first ground is incorrect in law: *Wortman v. Griffith*, 3 Blatchf. 528. The second does not apply here, because in our case credit was given to the vessel. In *The Joseph Cunard*, the vessel was chartered and the libellants sought to recover the amount of a bill of exchange drawn by the master in favor of the charterers' agent for disbursements made by the agent at Mobile. The owners of the vessel had an agent at Mobile whose duty it was to attend to all charges against the ship, and the master was specially instructed not to draw bills on the owners for disbursements, and this was known to the charterers and their agent. The case was properly decided on these grounds, and the remarks of the judge are merely *dicta*.

J. C. Dodge (*T. K. Lothrop*, with him), for the mortgagees. There never was a lien upon the vessel for any part of the libellants' claim.

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In order to create a maritime lien upon a vessel for supplies, there must exist, —

1. A necessity for the supplies themselves ; such a necessity as arises only under very special circumstances, and in an unforeseen and unexpected emergency.

2. A necessity for the credit upon the vessel. It must appear affirmatively that the supplies could not be had upon the credit of the owner.

The necessity for the supplies and for the credit must be such necessity as would justify the master in taking up money on a bottomry of the vessel : *Pratt v. Reed*, 19 Howard, 359.

I am well aware that the principles above stated are at variance with those upon which courts of admiralty have usually proceeded, but they are all of them established by the supreme court of admiralty in the case cited above, and some of them in *Thomas v. Osborn*, 19 How. 22, and must therefore now be regarded as settled.

A bottomry bond made by the master is invalid if it were possible for him before making it to communicate in a reasonable time with his owner : *La Ysabel*, 1 Dods. 273 ; *Wallace v. Fielden*, 7 Moore, P. C. 398. So if the master have funds of the owner in possession or within reach, or can borrow on the personal credit of the owner : 1 Parsons, Ship. & Adm. 143, 144, and cases cited ; *The Golden Rose*, Bee, 131. So if the bond were given by the master to relieve the vessel from arrest under legal process founded upon a claim that did not itself constitute a lien upon her : *The Aurora*, 1 Wheat. 96 ; *The Osmanli*, 3 Wm. Rob. 198 ; *The Augusta*, 1 Dods. 283, 288 ; *The Yuba*, 4 Blatchf. 352 ; *The North Star*, Lush. 45 ; *The Edmond*, Lush. 57, 66.

We have seen that the foregoing rules of law, well settled in regard to bottomry bonds, are equally applicable to an implied lien : *Pratt v. Reed*, *ubi sup.* Now, looking at the case before the court in the light of these principles, we find, —

1. There existed no special circumstances or unforeseen emergency. The vessel was not wrecked nor in distress. The case stands simply upon the ground that she was in a foreign port and needed ordinary supplies.

2. The master might have communicated with his owner and had a reply by mail in a week, by telegraph in an hour.

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3. It is not shown, or attempted to be shown, that the owner had not credit in New York when the supplies were furnished. On the contrary, it may be inferred that he had, from the fact that the amount annexed to the libel shows a large remittance from the libellant to the owner.

Again, no implied lien would arise unless it was so intended by the parties, or at least, unless the libellants, when they furnished the supplies, intended to rely upon a lien. The fact that they took a mortgage on the property shows that they had no such intent or understanding. The mortgage conveyed the property to them, and a man cannot be presumed to intend a lien upon his own property. Or if he once had a lien, the taking the mortgage was a waiver of the lien. The express lien created by the mortgage is inconsistent with the implied lien now claimed: *The Ann C. Pratt*, 1 Curtis, 340; *The Nestor*, 1 Sumner, 73; *The Chusan*, 2 Story, 455; *Ramsay v. Allegrè*, 12 Wheat. 611; *Fish v. Howland*, 1 Paige, 20; *Little v. Brown*, 2 Leigh, 353.

If for any of the items of the libellants' bill there ever was a lien upon the vessel, the payments made on account, and not specifically applied by the debtor or creditor at the time of payment, must be regarded as applied by the law to such items: *The Antarctic*, 1 Sprague, 206.

There are several items in the account annexed to the libel for stevedore's bills. It is settled that a stevedore has no lien upon the vessel for his services. It follows, of course, that the libellant could acquire no lien by paying for such services. The stream cannot rise higher than the fountain.

LOWELL, J. This brig was owned in Nova Scotia, and the libellants, who reside in New York, present a bill for the disbursements, as they are called, of the brig, furnished by them at New York upon the request of the master, and for a certain other sum of money lent to him, as is presently more fully set forth.

The first part of the case has brought into discussion, as usual, the decision of *Pratt v. Reed*, 19 How. 359. That case has been understood to decide that a material-man, in order to maintain his lien, must bring himself within the rule applied to a lender on bottomry, and show not only that the supplies were necessary for the ship, or appeared to be so, but that the master had not, or ap-

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peared not to have, funds of the owner in hand to pay for them, and also that the owner had no personal credit on which they could be procured at the place where they were furnished: *The Sarah Starr*, 1 Sprague, 453; *The Sea Lark*, ib. 571; *The James Guy*, 1 Bened. 112; *The Neversink*, cited 2 Parsons, Shipping, 335 n.

Accordingly, the main issue in all these cases of late years has been whether the owner had such credit, and judges have been somewhat astute in ascertaining in each particular case that he had not. My own opinion has been guided by those above cited, and I have followed the course of inquiry pointed out in them. A more careful scrutiny of the leading case has brought me to doubt whether it professes to lay down any such principle.

It must be remembered that material-men have often nothing to do with credit at all, any more than other mechanics. If a shipwright puts a new spar into a foreign ship, he expects payment when his work is done. He cannot exact it beforehand, because his labor is furnished from day to day, and the amount is neither liquidated nor due until the last day's work is done. If the master then neglects or refuses to pay him, he brings his libel. It is mere mockery to tell him that the owner is a man of good credit. That is only one more reason why his bill should be paid. The mechanic cannot transmute the owner's credit into money, and the master will not. It is for this reason that he brings his suit, and it is altogether a novel answer to a suit that the person liable to pay is able but unwilling to do so. Such an answer as that, of course, merely amounts to telling the creditor to seek redress at the home of the debtor, which is what he never contracted to do. It was to save him from this necessity, which in most cases would be a total denial of justice, that the lien of material-men was established throughout the mercantile world; and it is for this reason, probably, that in England and America it is confined to foreign vessels. The contracts of material-men are not really maritime, at least many of them are not; they are, in their reason and origin, much more like those of an unpaid vendor than like an ordinary maritime lien.

In England the lien has always existed, though for nearly two centuries it was in a state of suspended animation, because the superior courts would not enforce it, nor permit the admiralty

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courts to do so. The statute 3 & 4 Vict., ch. 65, § 6, gave the court of admiralty jurisdiction of suits for necessities furnished to foreign vessels in English ports, and thereupon the liens became operative, although there is not a word in the statute about liens; and the court has ever since enforced these well-known maritime liens, and every decision of that court which upholds such a lien is necessarily a decision upon the general maritime law of liens, as well as upon the statute. Now, in the numerous and important cases which have been reported in that court on this subject since that statute was passed, no one has appeared bold enough to argue that the credit of the owner has any thing to do with the matter; and it is safe to say that no one ever will take that point, because the main purpose of the act was to save material-men the inconvenience of being obliged to resort to the foreign owner to recover just debt payable at their own home and not at his. Laws are made for the enforcement of contracts according to their terms against persons in good or bad credit. If the mechanic, in the case supposed, had made inquiry and found that the owner was of good credit, what then? Is he therefore not to put in the spar until he is paid a sum as yet uncertain, contrary to all sense and usage?

This example merely illustrates the reason and principle out of which the lien of material-men has grown. The same law applies to the ship-chandler who has agreed with the master for cash on delivery, but whom the master has cheated of his cash after receiving his goods. That the owner has credit, or even that the master has funds, only makes his position the stronger. He asks for his fair dividend of the funds according to his contract.

Nor is it any answer to him that by the law of some States and countries he may attach the ship in a common-law action, and hold it as security for his debt. The jurisdiction of the common-law courts is not exclusive. It is no defence to a libel that the libellant has a remedy at common law. And if it were, this remedy is often delusive; for the attachment in most of the cases which have come under my notice would amount to nothing, because the class of vessels that come here from the British provinces are almost always mortgaged for more than they are worth in this market, and the mortgage takes precedence of the attachment.

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The remedy is not adequate; besides, it exists equally whether the owner's credit is good or bad. It is a mode of enforcing payment of comparatively recent origin, of limited use, and by no means calculated to supersede the old admiralty remedy. I cannot suppose, therefore, that the decision of *Pratt v. Reed* was intended to apply to material-men who have given no credit at all.

If the material-man has given credit, he must show that the master had not, or appeared not to have, funds of the owner in hand wherewith to pay for them; because it is an elementary principle of the law of agency that the agent cannot pledge his principal's credit when he has, with the knowledge of the creditor, funds of the principal to apply to the immediate payment of the debt. Not that the law of lien depends always upon that of agency, but in this instance it does.

But when this is shown, when it appears that the supplies were necessary and that a credit was necessary, the common law pledges the credit of the owner, and the maritime law that of the vessel; just as it does to a seaman or a shipper of goods, neither more nor less. Of course, it is a valid defence to an asserted lien to aver and prove that the personal credit of the owner, and that only, was pledged; just as it would be to a suit by a shipper of goods, and might be even to a seaman's libel under some very peculiar circumstances. But it is no defence to say that the personal credit of the owner would have been sufficient, when in fact it was not relied on.

The lender on bottomry stands on a wholly different foundation. He is agreeing for a credit to be liquidated at the home of the ship-owner; and he must furnish that credit at the lowest market rate. As he has agreed to be paid at the home of the owner, and as a solvent owner can be compelled to pay his debts at home, the law says that the lender shall not charge the unusual, and often almost ruinous, marine interest which is allowable in bottomry, if the money can be obtained at the usual rates and on the personal credit of the owner. This is the reason, and the only reason, that the rule in question has been adopted in bottomry law.

The very foundation of the right of the master to borrow on bottomry in one class of cases is, that he must pay the material-men whose contract entitles them to payment in the foreign country.

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try, and who have a charge on the ship. But the doctrine of the owner's personal credit does not apply to them, for the reasons I have stated, and for those given by Judge Sprague in the *Sarah Starr*, cited above, to which I refer.

If then the case of *Pratt v. Reed* is to be understood as Judge Sprague and other district judges have understood it, the law is not only new, but it creates this anomaly: that if one of our vessels is repaired or supplied in the British provinces, and a suit is brought in this court by the material-men, my only inquiry must be whether the materials were furnished, and were necessary; but if the case is reversed, the parties remaining the same, and our merchants have supplied the foreign vessel, I must superadd an inquiry, which the creditors did not concern themselves with, whether the ship-owner in the provinces was a man of good commercial standing in his parish. This is not equality nor reciprocity, nor is it sound maritime law.

I shall therefore, perhaps, find it my duty to cause such a case to be reviewed by the circuit court whenever the facts render it necessary, for I confess to great doubts notwithstanding the opinions to the contrary, including my own as expressed on former occasions, whether the supreme court intended to decide any thing more than that when a credit was given it must be shown that a credit was necessary. It is, perhaps, more probable that they overlooked for the moment the distinction between bottomry loans and the debts due material-men, than that they intended to establish a strict analogy between them in this respect.

In this case the largest item of the account is for money furnished to the master, for which the libellants took a mortgage on his part of the vessel. This money was raised to relieve the vessel from an attachment in a court of common law, at the suit of a creditor of the remaining owners. There is no pretence that the debt, thus paid, was a charge on the vessel; and the libellants are driven to maintain that the master may always hypothecate his vessel to relieve her from any detention which interferes with the prosecution of his voyage, and not only so, but that such an hypothecation will be implied. The maritime law contains no such term as that. It is true, as I said before, that bottomry bonds have been upheld when they were given to relieve the vessel from debts

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which by the law of the country where the vessel was lying would be a charge upon her, though they would not be such, or at least could not be enforced as such, at the home port. But I do not recollect that this doctrine has ever been applied to debts contracted before the last voyage. Even if it has, no law has ever given to the master authority to hypothecate the ship for personal debts of the owners, unrelated to the ship or its navigation. By the law of New England, and in a modified form, by that of most of our States, personal property may be attached and held as security for any debt of its owner. But there is no maritime lien on the property so attached, by reason of the attachment, nor does the fact of attachment give an agent of the owner an authority which he would not otherwise have, to hypothecate it for payment of that debt. The master of a ship is an agent, whose duties and powers are well understood and defined. It is no part of his authority to hypothecate his ship for the general debts of the owner. Nor did he undertake to do so in this case. On the contrary, he gave a mortgage of his own share of the vessel, and an agreement that the ship should be consigned to the libellants, from time to time, till the freight should have paid the debt. This agreement he did not fulfil, and the libellants must obtain their indemnity, if the mortgage proves insufficient, by such personal action as they may be able to maintain.

For most of the items of that part of the account which were furnished before the vessel sailed on her last voyage, and which are shown in schedule B., there appears to be a lien. If it be material that the owners were not in good credit, the attachment and mortgage show that they were unable to pay their debts, and were obliged to resort to extraordinary means to satisfy their creditors, even to pledging the property of their master. Under any construction of *Pratt v. Reed*, the libellants could maintain this part of their case. They have been careful, prudent, and diligent. No doubt they relied largely on the freight for their security, but this does not exclude the conclusion that they also relied on the vessel. The cases cited by the libellants establish this point.

Each item of schedule B. has been carefully scrutinized by counsel, and fully discussed. The general rule in this country is that the person who advances money to pay the debts which are

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on the ship has himself a lien for his reimbursement: *Osborn v. Osborn*, 19 How. 22; *The Gustavia*, Blatch. & How.

and this is now the law of England, with some refinements and distinctions not necessary to be here examined. Perhaps the law has grown out of the doctrine of subrogation. But whether or not, the lender of money has not usually any more ample remedy than the material-men themselves would have had. See *Child v. Child*, Daveis, 71. It has been decided in several cases, a stevedore has no lien on the ship: *The Amstel*, Blatch. & How., 215; *The Joseph Cunard*, Olcott, 120; *The S. G. Owens*, 1 Blatch. Jr., 370. The reason given by some of the learned judges, that the contract is not maritime, does not appear to be decisive, since the contracts of other material-men are no more so. The expenses for supplies and repairs to enable the vessel to perform her voyage, and only in that sense are they maritime. The other reason, that the cargo is a collateral matter and no part of the necessary equipment of the vessel itself, is more to the purpose, though not satisfactory, because a ship cannot be used to advantage without a cargo. But it is important to adhere to decided cases, and I shall follow these, though I doubt their correctness as applied to foreign vessels, and should be glad to have the point reviewed by the circuit court. In England, the stevedore may arrest the ship under the statute of Victoria: *The Waban*, cited 1 Pritch. Dig. 364.¹ Retaining the vessel for charter has likewise been decided not to create a charge on the vessel. Pilotage and towage are maritime expenses for which there was a lien on the vessel.

The mode in which the payments should be appropriated, has been discussed at the bar. Judge Sprague decided that when the debtor had two distinct debts, and money was paid him generally without specific appropriation, it was his duty to apply it in the most beneficial to the debtor, which, in that case, required an appropriation to extinguish a builder's lien: *The Antarctic*, 1 Blatch. Jr., 206. This rule does not apply to a running account, and requires the creditor to satisfy first all those items for which he has a lien. To such an account the general rule applies, that, if there is no appropriation at the time, the law will apply the payment to the items, in the order of their dates. Applying this

¹ Title, *Material-Men*, 71.

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rule, a considerable part of schedule B. has been paid, if I understand the account. Those that remain, and for which there is a lien, on the principles above stated, can be recovered by the libellants, with costs. *Interlocutory decree for the libellants.*

Re GEORGE A. MURDOCK.

JULY, 1869.

A creditor whose debt is provable may oppose the discharge of a bankrupt, although it has not been proved.

It seems, that one who has in good faith bought a debt against the bankrupt after the commencement of the proceedings may prove it in the bankruptcy, the form of oath being varied to conform to the fact.

Such a debt is not annihilated, and may be proved by the assignor or else by the assignee.

Where the bankrupt had made an open and notorious conveyance of land to his wife to hold to her separate use, more than ten years before the bankrupt law was passed; *held*, that such conveyance could not be set up as a fraud to prevent his discharge in the absence of evidence to show that it was held on a secret trust for the bankrupt; nor was the omission of it from the schedule a concealment of property under that act.

Where it appeared very doubtful whether the bankrupt had any interest in a certain promissory note held by a third person, and there was no evidence of any wilful concealment, and the assignee had had all the benefit of the title; *held*, the bankrupt ought to be discharged, notwithstanding the note was not on his schedule.

BANKRUPTCY. — Mrs. Eliza Ventriss, the sister of the bankrupt, was set down in the schedule as his largest creditor. After the petition was filed and before the first meeting of creditors, she sold the negotiable note which was the evidence of her debt, to George W. Ware, Jr., who did not prove the debt, but appeared to oppose the discharge of the bankrupt, which he did both on his own account and as attorney for Mrs. Ventriss.

E. Merwin, for the bankrupt, contended that neither Mrs. Ventriss nor Mr. Ware could prove the debt, because neither could take the oath prescribed by the supreme court in form No. 22; and that even if the debt were provable it must be proved before the creditor could be heard.

J. S. Abbott, for the creditor.

LOWELL, J. I have repeatedly decided that a creditor whose

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debt is provable may oppose the discharge. It is to be regretted that the district courts should not agree upon the construction of the statute in all its parts; though considering the multitude of questions which arise in the administration of this new branch of jurisprudence, such disagreement can be no matter for surprise. We may rather congratulate ourselves that upon many of the most important points there has been great unanimity of opinion. I shall not state the reasons for my opinion at large, because there is a reported decision of Judge Hall, of the northern district of New York, in which the arguments and authorities are collected and stated with great care, and the conclusion arrived at is the same that I have always acted on. *Re Shepard*, 1 B. R. 15; see acc. *Re Boutelle*, 2 B. R. 51. On the other side, see *Re Levy*, 1 B. R. 66.

The argument is briefly this: A creditor who has not proved his debt has no standing in the bankrupt court for most purposes, because he has no interest in the settlement of the estate, in the dividend, or in the acts or omissions of the assignee. His assent is not necessary under sections 30 and 33; but he is interested to oppose the discharge because he will be bound by it. He may have many sufficient reasons for not proving his debt; as, for instance, that he would be obliged to either relinquish or realize a security which, though inadequate, is not in a state to be advantageously sold. Yet he is bound by the action of the court, and is in effect a party to the discharge. On principle therefore he ought to be admitted to contest it. We may admit that "any creditor" in section 31 is ambiguous; but on its face it includes all creditors, and the ambiguity can only be raised by construction. Now the statute itself, at section 29, and the form prescribed by the supreme court, both contemplate notice to creditors who have not proved, for the former requires notice by publication, in addition to a written notice to all who have proved, and the latter notifies all creditors who have proved, and all other persons interested, to appear and show cause. But section 34 is to my mind quite decisive of the intent of congress, because it authorizes any creditor whose debt was provable, though not proved, to apply to the court and have the discharge set aside at any time within two years after its date, on proving certain frauds to have been com-

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mitted, and that they were not known to him before the granting of the discharge. Now it seems a forced, not to say absurd, construction of the statute that the knowledge which could not be availed of by the non-proving creditor to oppose the discharge, should yet be a complete answer to his application to set it aside.

Of course the opposing creditor must have a provable debt, and must give evidence of that fact, and this brings us to the second point, which was so ably argued, that there is no such debt here, because neither of these supposed creditors can take the oath that the bankrupt was, both at the commencement of proceedings, and still is, justly indebted to him or her. I do not find any thing in section 22 to avoid a real and honest transfer of a negotiable debt made after the petition is filed, and without any purpose of influencing the proceedings, but rather an implication that it may be done if there be no such purpose. And I can conceive of no reason why it should not be. It is true that every thing is to be settled as of the commencement of the proceedings, and the rights of the parties are fixed at that time; and by the express language of section 20 a debtor of the bankrupt cannot buy up a claim against him after that time and use it in set-off; but a set-off is payment in full of the debt set off to the extent of the debt against which it is set off; and a creditor who obtains payment in full has an unjust advantage over the rest. There is nothing that I can discover in the statute or in its policy to restrain the negotiability of debts, or to require an honest debt to be annihilated because it has been honestly transferred; and this must be the result if neither party can take the oath necessary to prove it.

The form of oath prescribed by the supreme court does indeed appear to contemplate that there has been no transfer. It is : That the bankrupt was, at and before the filing of the petition, and still is, justly and truly indebted to the creditor. But this form is made for the most usual cases, and is not intended to change the statute, but may itself be varied to meet the exigency of different cases. Taken literally, it would exclude administrators or other assignees by mere operation of law, which certainly cannot have been the purpose. The oath required by the Massachusetts statute was like that prescribed by the supreme court, and I am informed that it was understood to prevent an assignee

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debt acquired after notice of the warrant was published from
ing it, and that the practice in courts of insolvency was to
the assignee of a debt to transfer it back to his assignor,
then took the oath and retransferred the debt. This was a
tous way of arriving at justice, and one that required a
oath to be taken, and I am not aware that any superior court
State ever passed upon the necessity of such action. The
of oath, at any rate, was prescribed by the law itself, and our
assed later has not adopted it. My own impression is pretty
ed that the debt may be proved by the person who owns it at
me of proof, the oath being modified to conform to the fact.
precise point is not passed upon because both Mrs. Ventritt
fr. Ware oppose the discharge, and I am clear that one or the
may do so.

allegations of fact are that the bankrupt wilfully omitted from
chedule and concealed from his assignee the equity of redemp-
f a house and land in Pittsfield, and his interest in a certain
issory note. The house and land were conveyed to the bank-
wife in 1856, at a time when he swears he was solvent. The
yance was open and notorious, and was well known to his
. Such a conveyance does not stand on the footing of a mere
tary conveyance to a stranger, or of one made on a secret
for the grantor, and there is no evidence here of any such
. The consideration is a good one, and its operation is not
t. No doubt the debtor has always had, and always will have,
advantage from this estate; but it would be a perversion of
to say that there is any concealment about it. Whether the
yance could be avoided by the assignee is a different question,
depends on facts not fully developed at this hearing. The con-
ce, of course, cannot be alleged as a bar to the discharge,
se it was made long before the bankrupt law was passed.
only question before me is that of concealment; and I do not
that any was practised.

ie interest of the debtor in the note, if any, is equitable rather
legal, and I am not satisfied that there was any intentional
alment of it, or any evasion in his conduct or schedules or
ination. Where property is in fact concealed *in specie*, or
e the title is concealed by a colorable conveyance, the dis-

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charge should be refused ; but there are many doubtful cases in which justice seems to demand that the assignee should be entitled to try his rights, but in which unfairness on the debtor's part cannot be made out. The assignee in this case has obtained full knowledge of both these interests, and has sold whatever title he had in them ; and I do not see that the bankrupt has obstructed him at all in obtaining his full rights, or that he has wilfully concealed any thing.

Discharge granted.

THE GLAUCUS.

JULY, 1869.

Quere, what is the true construction of Stat. 25 July, 1866, which requires ocean-going steamers and those carrying sail, to have one white light as prescribed by the act of 1864, and requires coasting steamers to carry two such lights, the fact being that many coasting steamers are ocean-going and carry sail ?

If a sailing vessel and a steamer are crossing at an angle of forty-five degrees, and the pilot of the steamer sees both lights of the sailing vessel at any considerable distance, and the steamer is going twice as fast as the sailing vessel, and puts her helm so as to increase the distance between them, it is impossible that any act done on board the sailing vessel after both her lights were thus seen, should bring the vessels together, stem and stem.

If a vessel is capsized in a collision, and the master and crew abandon her to save their lives, and in the exercise of due care and skill the master decides not to try to save her, the loss is presumed to be total.

If the owners of a vessel send her to a foreign port for a cargo, which the master procures by barter, the damages for a loss of the cargo are what the master paid for it, to the person of whom he bought, and not what it cost the owners, on the whole, to obtain it by the adventure.

To this may be added an allowance in the nature of freight for the voyage from the foreign port, which has increased the value of the goods, and has been destroyed by the collision.

If the owner of a vessel injured by collision, has repaired his ship, with prudence, skill, and diligence, and acting as a wise owner would, if not insured, the wrongdoer may, in some extreme cases, be liable for even more than the value of the ship, if the excess is made up by an unexpected amount of demurrage.

COLLISION. — At about ten o'clock, on the night of the first of February, 1868, the schooner Electric Flash, with a full cargo of frozen herring on board, was beating up Long Island Sound on her voyage from Newfoundland to New York, and was off New Haven. She was making about five and a half knots, and was

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close-hauled on the port tack, heading about northwest by west, the wind being a whole-sail breeze from west southwest. The large propeller steamer Glaucus was bound from New York to Boston, with a full cargo, and was making about eleven knots, heading east by north. The moon and stars were shining and the night was clear. The vessels came together, and the schooner received a very severe wound in the larboard bow, which cut her down on that side, and started many of the planks on her starboard bow as well; she filled and capsized, and her crew saved themselves in their boat and were brought to Boston by the steamer, it being thought upon examination that she could not be towed into a port of safety by the Glaucus. She was afterwards taken to New London by salvors.

Both vessels had the proper side-lights, and the steamer had two white lights, one at her bow and one at her mast-head.

LOWELL, J. The libellants cite the statute of April 29, 1864, 13 Stats. 58, which prescribes for steamers only one white light at the foremast-head, and prohibits all lights not prescribed. The claimants say that all the Sound steamers carry two, and rely on the act 25 July, 1866, ch. 234, § 11, 14 Stats. 228, which enacts: That the provision for a foremast head-light for steamships, in the former act, shall not be construed to apply to other than ocean-going steamers and steamers carrying sail; and that all coasting steamers, and those navigating bays, lakes, or other inland waters, shall carry, besides the red and green lights, a central range of two white lights, one of which is to be at the head of the vessel, &c. It is not shown that the two lights of the Glaucus did not conform to this later statute, nor that the misfortune was in any way attributable to the state of her lights. I refer to this point because the law of 1866 has not been cited here before, and because its language does not seem to be very happily chosen. It puts ocean steamers and steamers carrying sail, in one class with one sort of lights, and coasting steamers in another, with a different sort, whereas most of the coasting steamers on the Atlantic coast, are both ocean-going and carry sail, so that it may sometimes be difficult for the persons concerned to know to which order they belong. Fortunately, however, nothing turns upon this distinction in the present case.

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The Glaucus was bound to see the schooner on such a night as this in good season, and to avoid her ; and if it be true, as is testified, that propellers of this size and class are slow in minding the helm, this only makes it the more essential that the greatest vigilance should be exercised by their officers and crew to discover sailing vessels at the earliest possible moment, for it cannot change the law, nor can it be so great an obstacle as to excuse the steamer altogether, and except her out of the general rule of law on such a night as this. All this is well understood by the claimants ; and they aver that the steamer took all proper measures, but that the schooner ported her helm, and thus caused the collision.

The pilot, second mate, and quartermaster of the steamer were in her pilot-house, and there was a man forward on the lookout. The pilot testifies that he saw a red and a green light about four points on his starboard bow, thought the vessel was a steamer, but that there was no danger, and starboarded a little ; presently observed that the green light was shut in, and saw sails on the vessel, and then ordered the wheel hard a starboard, and afterwards finding he could not run ahead of the vessel stopped his engine. He estimates the distance at which he first saw the lights, at three-quarters of a mile. The testimony of the second mate and quartermaster is substantially similar. The lookout saw only the red light ; he makes no estimate of the distance at which he first perceived it. They all think the schooner changed her course, and that is the disputed question of the case. The appearances on which they rely are, that the sails were more and more plainly seen as the vessels approached each other, and that the green light disappeared.

I have carefully considered the claimants' evidence on this point, and am not satisfied that the fact is proved. The steamer changed her course, and it was impossible for her crew to say whether the schooner did so or not, unless they had something besides their own vessel to compare her with, or unless the effects which they saw could not be accounted for by their own change of course. They feel very sure that she did change, and none the less so, because if she did not the steamer must have been in fault. That the sails on the port side of the schooner were seen more plainly

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the vessels approached each other is accounted for by the fact of approach. If both lights were seen, and then only the red light, and the steamer kept her course, the schooner must have changed course; but the steamer did not keep her course, and I doubt if they ever saw both lights. The witnesses who depose to this were mistaken in two of their suppositions, and may have been so in the third; they took the Electric Flash for a steamer, and they thought her not dangerously near. In this case neither vessel could see both the side-lights of the other until she was crossing her bow. Seeing both lights means that you are on the course of the vessel whose lights you see. If two vessels are on opposite courses, each is on the other's course; but here the vessels were approaching at an angle of forty-five degrees, and neither could see along the line of the other's course till she was crossing her bow. If the steamer then was across the bow of the schooner when she first made her out, and was going twice as fast as she, and so manœuvred as to increase the distance between them, all which is averred by the claimants, a collision was not possible, whatever the schooner might do, unless the vessels were so near when the steamer first discovered the lights that it was already almost inevitable; and however near they may have been, their bows could hardly come together under those circumstances. I repeat that the pilot's account that he saw *both* lights of a vessel four points on his starboard bow and starboarded his own, and was going twice as fast as the other vessel, which in turning her helm struck his stem, is incredible, unless it happened in less than one minute; and if this heavy and slow-working steamer had swung three points to port under the influence of her starboard helm, it would seem that some considerable time must have elapsed. No sudden or accidental change of the schooner's course to bring both her lights to view is possible, because such a change must have been to windward, and she was close to the wind and did not tack. I cannot but believe that the men in the steamer's pilot-house were either mistaken in thinking they saw both lights, or else that they have much overestimated the time that elapsed. The lookout, who should have seen the schooner first, saw only the red light; and this is precisely what he should have seen, on the theory of the libellants.

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The libellants' witnesses are clear and consistent in declaring that the schooner's course was not changed.

[The judge here examined the evidence on this subject.]

I am satisfied that the steamer has not only made out no sufficient justification, but that the facts show affirmatively that she was in fault. She is in the dilemma that she should either have slowed her engine, and, if necessary, have stopped and reversed, as the statute requires; or if it was too late for that, and she took the most prudent course after seeing the schooner (which I am inclined to believe), she should have seen her sooner.

Interlocutory decree for the libellants.

J. C. Dodge, for the libellants.

F. C. Loring & M. F. Dickinson, Jr., for the claimants.

On the coming in of the assessor's report, the case was again spoken to by the same counsel.

LOWELL, J. The report of the assessor in this cause is excepted to by both parties. It seems that the schooner belonged at Gloucester, and was sent thence to Fortune Bay in Newfoundland, by her owners, for a cargo of frozen herring, which was obtained, partly by purchase and partly by barter; and while on her voyage to New York with this cargo on board, she was run into in Long Island Sound on a dark and windy night and sunk to the water's edge by the steamer Glaucus, and was abandoned by the master and crew, and picked up after some days and taken into New London, where she was repaired.

The respondents maintain that they should not be made responsible for the loss of the cargo, because it might, by due diligence, have been saved. This is an important point of fact which affects a part of the damage to the vessel as well as the whole of that to the cargo, and the assessor has reported the evidence; upon consideration of which I agree with him that the master acted in good faith and with reasonable skill and diligence in the premises. He was of opinion that his schooner would sink before she could be towed into the nearest port, and the master and pilot of the steamer appear to have been of the same opinion; and the mate of the Glaucus, after examination, reported that the steamer could not safely undertake to tow her. It was only the extreme

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and unusual coldness of the weather, which kept the fish frozen, that prevented the schooner from going down within an hour or two after the disaster occurred. The general rule of *post hoc propter hoc* applies in these cases, and it is for the vessel in fault to show that the negligence or want of skill of the libellants, or their agents, has aggravated the damages which would have naturally followed their own wrongful acts. I affirm the report on this point.

In ascertaining the damage to the cargo, the assessor has made a careful and ingenious computation of the cost of the voyage to the owners, as being the actual cost to them of this cargo. This is too speculative a mode of ascertainment when the price paid for the cargo is in proof, because it makes the value depend not on what the cargo cost in fact, but on the results of a different though connected adventure. I decided in the case of *The Monticello* that the prime cost and interest was the rule; this the assessor was well aware of, but saw that these libellants had really lost more than that sum. This does not change the rule of damages nor the price of the cargo. The purchaser cannot have paid for these herrings more than the seller received, which was \$1.68 per barrel. The cost of getting that sum to the place where the bargain was made is no part of the price. The loss was later, and was in the nature of freight from Newfoundland. The owners who load their own vessel are held responsible for freight, *eo nomine*, in ascertaining the limit of their statute liability in collision cases: *Allen v. Mackay*, 1 Sprague, 219. If, therefore, they had wrongly injured the steamer, they would be held to be earning freight, and when the other party is in fault they should have a corresponding advantage. The assessor, therefore, may allow such a sum as would be the fair net freight, above expenses, for the voyage from Fortune Bay to New York, though not the freight or expenses from Gloucester to Fortune Bay, which is the form in which the account has been made up; or, what is the same thing, he may consider the goods as increased in value by that amount. In this assessment the market value, if there be one, will be the guide; that is, what the charter-money for such a voyage would be, less sailing expenses.

The only remaining exception of the respondents is that the

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repairs of the vessel and the demurrage together, as allowed, amount to more than the value of the vessel immediately before the collision. They contend that the extreme limit of damages is what would be assessed for a total loss. The assessor finds that the schooner was carefully surveyed, and that the libellant acted in good faith and with care, skill, diligence, and fidelity; that the excess of price over the estimates could not have been foreseen, and that this excess and the demurrage were enhanced by the unusually bad weather which happened to set in while the work was going on. The repairs themselves cost much less than the value of the schooner, and appear clearly by the report to have been such as a prudent owner would have undertaken. Under these circumstances I affirm the allowance of demurrage, even though this brings the total damages to a higher point than they would have reached if the schooner had been abandoned in the first instance. The case of *The Empress Eugénie*, Lush. 138, cited in argument, rests upon the principle that the wrong-doer shall not be held responsible for the repairs which a prudent and well-advised owner would not have undertaken, and in that point differs materially from this case.

Neither party having excepted to the amount of the demurrage, I assume that it was reckoned upon the proper basis. In collision cases demurrage is to be allowed for such time, if any, as the evidence shows that the vessel could have been employed, and at the net freight she might have earned less the expenses.

The exceptions of the libellant that the commissioner did not assess the value of the cargo in New York, and that he did not reckon deterioration of the vessel on her voyage from Gloucester to Newfoundland are overruled.

The report must be recommitted to the commissioner to find the amount of net freight which should be charged on the principles above stated, unless the parties can agree on it. The means for ascertaining the value of the cargo are already contained in his report.

Order accordingly.

Affirmed on appeal, October Term, 1870.

Re Batchelder.

Re C. W. BATCHELDER.

JULY, 1869.

Where a trader transferred his whole stock and book accounts to one creditor, about three weeks before filing his petition, and had no other property, but owed many debts; *held*, a preference unless explained.

It is no valid excuse for such an assignment, that it was made under threat of legal process.

If the necessary effect of an act is to prefer one creditor, the intent to prefer is presumed, though other motives may have co-operated to induce the act.

BANKRUPTCY. — The examination of the bankrupt disclosed that about three weeks before he filed his petition, he assigned and transferred his whole stock in trade and book accounts to his father, in satisfaction of a pre-existing debt. He had no other estate or property, excepting such as is exempted from the operation of the bankrupt law, and he owed a considerable amount of debts, and was in fact insolvent. It appeared that his father came to his place of business with a sheriff's officer, and threatened to attach his stock and break up his business unless he made the conveyance, and it was under this pressure that the assignment was made.

LOWELL, J. It is argued that this act was not a preference, because it was not voluntary. I have considered this question more than once, and am fully satisfied with my former decisions, that under the bankrupt act such a payment does not lose its character of a preference by being made under pressure. The English courts worked out the doctrine of preference from a consideration of the equities of the subject-matter. The word itself was not found in their statutes, but they held that the intent of the law being to distribute the assets equally among all the creditors, no unjust advantage ought to be given to any one creditor. But under their earlier statutes, the title of the assignee related back to the act of bankruptcy, and in declaring a trader to be bankrupt by reason of a preference, they indirectly deprived, or tended to deprive, the preferred creditor of his title, and that without hearing him. It became necessary, therefore, to be very cautious not to create acts of bankruptcy which might prejudice honest creditors. A creditor has a right to demand and receive payment of his debt,

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they said; and from this starting-point they arrived at the rule that a payment made in pursuance of a lawful demand, should not be considered a fraud on the act.¹

But they never carried this doctrine to the extent of saying that a creditor might lawfully take an assignment of all the property of a trader. On the contrary, that was always and conclusively an act of bankruptcy, from which even pressure could not free it, because it must have been obvious to the creditor at the time that if he got the whole, no one else could get any thing. Accordingly the English law has two conclusive presumptions. One is that a trader who conveys his whole property to a pre-existing creditor, must have contemplated a preference of that creditor; and the other, that a debtor who pays an honest debt, with a part only of his assets, does not intend any fraud, if the payment was in consequence of the threats or demands of the creditor.

Our law adopts neither of these presumptions as conclusive. It defines a preference in the statute itself; or rather it has language which is inconsistent with the English definition. It makes the intent to prefer, or give an advantage to one creditor, the important thing; and this may evidently concur with pressure on the part of the creditor. For instance, in the leading case of *Denny v. Dana*, 2 Cush. 172, which is more important in construing our statute than the English decisions are, because the statutes are more alike, pressure was not allowed to avail in answer to a manifest preference. The doctrine of that case has been followed in many decisions under the bankrupt act, and denied, so far as I know, in none.

It must be remembered that by our law the assignee's title dates only from the filing of the petition, and that the bankrupt may be guilty of a preference which will subject him to the act, without involving the preferred creditor, unless the latter had reason to know or suspect the illegal intent.

On the other hand, the fact that the conveyance was of all the property will not perhaps in all cases conclusively show a preference. It is a very important circumstance, and almost decisive, but the presumption is still one of fact, and the question in every case is

¹ See *Re Waite & al.*, *supra*, 207.

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whether a preference was intended. It would be very difficult to explain so suspicious a fact, but I am not ready to say that there may not arise a case in which it could be explained.

No explanation is made in this case, and the discharge is refused. *Discharge refused.*

J. L. Colby, for the opposing creditors.

W. H. Towne, for the bankrupt.

THE ISLAND CITY.

JULY, 1869.

The statute of Massachusetts giving liens on ships for repairs is valid, so far at least as it applies to the refitting and renewing of domestic vessels to adapt them to a new business.

If the equitable owner of a ship lives in the port where the repairs are furnished, and the dealings are with him as owner, the ship is domestic so far as liens are concerned, though the legal title be in a foreigner.

By the lien law of Massachusetts, Gen. Stats. ch. 151, the liens created under that law are postponed to mariners' wages.

But they take precedence of an earlier mortgage.

The admiralty has no jurisdiction to enforce these State liens, but it has power, as have all other courts, to pay out a fund in its registry to the persons who have valid liens upon it.

A mortgagee of a ship stands in this respect like any other lien-holder, and he has a right in the admiralty to the fund arising from a sale of the ship, or to so much of the fund as is not required to pay liens that have priority of his.

The ship-keeper of a domestic vessel, which is being repaired for a new use, has not a lien on her for his wages by the general maritime law, as now understood in the United States.

The owner of a vessel incumbered for more than her value and libelled for wages, appointed a master when there was no prospect of his being able to redeem the vessel. *Held*, the master had no lien for his wages, though by the law of the flag he would have had a lien under ordinary circumstances.

Seamen engaged in good faith to serve on a ship which is intended to make one or more coasting voyages have a lien on the ship for their wages while the ship is getting ready, though she should never leave the port.

PETITIONS AGAINST PROCEEDS.—This steamer was proceeded against for wages and sold, and about five thousand dollars remained in the registry. Many libels were filed against the vessel after the sale, and warrants and monitions were issued in each case. When the cases were brought on for hearing, the judge

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said that the warrants were improvident, that petitions were the sufficient and proper remedy, and ordered the several proceedings to be consolidated, and that no costs be taken for the warrants. The former owners of the steamer, who had taken and still held a mortgage for fifteen thousand dollars, the full amount for which they sold her to her present owner, appeared as claimants of the fund in court. The remaining parties were, on the one hand, persons who had furnished materials, labor, and supplies for the refitting and victualling of the vessel while in port, and who claimed liens under the laws of Massachusetts, and, on the other, a ship-keeper and others, who asserted themselves to have maritime liens. It was proved that during the war the Island City was captured and condemned as prize, and was sold to Messrs. Bowker and others, merchants of Boston, now the mortgagees, who chartered her to the government of the United States as a transport. After the peace, a convenient trade had been found for the vessel in the British provinces, and it was thought necessary to take out a British register. Afterwards, Colonel Foote, an American citizen then residing in Boston, bought the steamer, and caused her to be transferred to his clerk, who was a British subject, this being requisite with the register that she had. Foote held a patent for the application of petroleum as fuel for steamers, and he undertook to fit up this vessel as a passenger steamer, and to adapt her machinery to his new fuel. It was his intention to take her to New York, Washington, and other ports for exhibition, after she had been successfully adapted and nicely fitted up; and the debts, for which liens were now asserted, were for the repairs, alterations, equipments, &c., which he ordered with this purpose in view. Two or three trial trips were made in the harbor of Boston, which the patentee considered successful; but his money and credit were exhausted, and the steamer was libelled and sold, as above stated. Some of the petitioners had obtained judgment under the lien law of Massachusetts; others had made due record of their liens under that law.

R. H. Dana, Jr., for the mortgagees.

C. G. Thomas, N. Morse, G. W. Park, L. S. Dabney, M. E. Ingalls, J. B. Richardson, H. E. Morse, W. W. Burrage, Allen & Long, for the several petitioners.

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LOWELL, J. I cannot uphold any of the petitions excepting those for wages, on the footing of maritime liens, though many of them are declared on as such. The equitable owner, with whom most of the contracts for labor and materials were made, lived here, and the courts look to the real facts and the actual credit in a case of this kind. Thus if a ship is held out as foreign, and is with good reason believed to be so by persons dealing with the master, the courts will hold her to have been foreign. *The St. Jago de Cuba*, 9 Wheat. 409. And if the equitable owner is the person dealt with, and he lives in the home port, the vessel is, for the purposes of a lien, treated as domestic: *The S. G. Owens*, 1 Wallace, Jr., 359. The latter case is in point here. Colonel Foote engaged these materials and services, and they were not of a nature to be needed by a foreign vessel to enable her to finish a voyage, or to reach her home, but were alterations and reconstructions intended to adapt her to a new use. This being so, those petitioners and those only who come within the benefits of the Massachusetts statute, and who have complied with its terms, have liens upon her, if that law is within the competency of the State to enact.

The recent decisions of the supreme court which deny the power of the States to create or enforce liens for collision, &c., are founded on the proposition that by the constitution admiralty jurisdiction is exclusively given to the courts of the United States: *The Moses Taylor*, 4 Wallace, 411; *The Hine*, ib. 555. As the same court has of late refused to admit that contracts for building, repairing, and supplying domestic vessels are maritime contracts, it follows that such matters are not within the prohibition. I speak not now of supplies for a voyage, which are maritime, and might be enforced in the admiralty were it not for a comparatively recent rule of the supreme court, but of repairs and supplies to a vessel while lying in her home port to receive alterations and fit her for a new employment. The State seems to have as much right to impress a lien on such a vessel for such a service as upon a house built within its borders. Rightly construed, the law of the State begins where the maritime law ends, and supplements it for the benefit of the citizens of the State. See *The Belfast*, 7 Wallace, 624, 646. I hold, therefore, that those of the petitioners who have judgments of the State court in their favor hold valid liens for the same.

I must apply the same rule to those who had taken all the necessary steps to record and perfect their liens, but who were prevented from enforcing them in the State court by the sale of the ship under the warrant of this court. The sale passed a clear title, but the admiralty court transfers all lawful liens to the proceeds. The State law, which is found in the general statutes, ch. 151, sections 12-20, declares that the lien shall last until the debt is satisfied; and none of those debts have been satisfied.

I cannot give any remedy to the petitioner Clancy. He says he was master of the vessel, as well as clerk and general agent of the owner; but he was appointed after the original libel was filed, and after the owner must have seen that he could not pay his debts and take his vessel to sea again. To call the petitioner master under such circumstances, when his duty was only to look after the suit, is in effect a device for giving him pay out of the property which belonged to the creditors. I am not ready to admit that a lien can be created in that way, *pendente lite*. See *The Gazelle*, 1 Sprague, 378. I do not reject his petition because he was master, for, by the law of the flag, the master has a lien on the vessel, and seamen have a right to invoke the law of the flag: *The Havana*, 1 Sprague, 402. Seamen stand very differently from material-men, and are protected by their flag.

Nor has Holden a lien; he was a ship-keeper, and made himself useful in taking care of the machinery, &c. The contract with such a person has been decided not to be maritime: *The Thomas Scattergood*, Gilpin, 1; *The S. G. Owens*, *ubi supra*. I do not fully agree with those judgments in their application to a foreign vessel, but in such a case as this they are sound.

Another of the petitioners, Norton, agreed to furnish sails, and made but never delivered them, choosing not to renounce his common-law lien. I do not think he comes within the purview of the statute of the State as one who has "furnished" materials in the repair of the steamer. He agreed to furnish sails, but never furnished them. His suit, if he should bring one, could not be for goods sold and delivered, but only for damages for not accepting, or for goods bargained and sold. It seems to me he must rely on his rights at common law; as the marshal did not take the sails.

Whether the petitioner, Maynard, who is a shipwright, had a

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lien by the statute, would not be material, because the ship was taken from his yard and dock by the marshal, and he certainly had a lien at common law, which this court is bound to respect: *The Gustaf*, Lush. 506. No doubt he has a lien by the statute too, and I see no reason for putting him on any different footing from the other material-men. If the law of Massachusetts gave him a priority it would hold good against the proceeds, but none is set up, and I have not examined the question.

The small sums due for mariners' wages are to be paid first, because they take precedence by their nature, and because section 12 of the statute expressly recognizes their priority.

That section prefers the statute liens to all others excepting for wages, and it seems to follow that the mortgage must be postponed to those liens which I have found to be valid. It is a hard case for the mortgagees, but I see no help for it.¹

There remains, however, the point which has been argued with much zeal and learning, that the mortgagees are the only persons who have any standing in court, and that I have no power to do any thing with this fund excepting to order it to be paid over to them. To this argument I cannot yield my assent. It is true that the admiralty has no jurisdiction of any of these liens, because they are not maritime. It is equally true that it has none to foreclose or deal in any way with a mortgage: *The John Jay*, 17 How. 401. The mortgagees call themselves claimants; but their rights are not changed by their pleadings. They are no more claimants than the other petitioners are. They all represent the owner, in a sense, because they put forward rights which they have derived from him, but those rights must be satisfied in the order of their priority. None of them appeared until after the vessel was sold, and they are, therefore, technically speaking, petitioners, and not claimants, the mortgagees included. I have no jurisdiction of an original libel by any of the parties now before me except the seamen; but I have jurisdiction to pay a fund in the registry to the person to whom it is pledged, if he makes due demand for it. No court is so humble as to be obliged to take the property of A. and give it to B. And indeed such a transaction would show rather an excess of jurisdiction than the want of it. The argu-

¹ So held since this opinion was given in *Donnell v. The Starlight*, 108 Mass. 207.

ment, as I have said, if sound, would end the case of the mortgagees with the rest, but it is not sound. When a ship has been sold the admiralty court has jurisdiction to distribute the proceeds: *The Angelique*, 19 How. 239. It is not a question of admiralty jurisdiction, but of the power of a court to deal justly with a fund in its registry. On the day this case was argued I ordered the moiety of a fine which had been recovered by indictment in the name of the United States, to be paid to the informer. I had no jurisdiction, nor had any other court, of a suit by the informer against the United States; but I had the jurisdiction which all courts have to deal with a fund in the registry according to the rights of those whose property has been converted into money by the order of the court, or who have, for any other reason, a lawful interest in the fund.

I should be glad to save the parties the expense of an assessor by auditing their several demands, did not the pressure of imperative duties make it impossible.

Order: That the seamen's wages be paid in full; that the remaining sum be paid to or divided among the holders of those liens hereinbefore pronounced valid pro ratâ. If more remains, that it be paid to the mortgagees. An assessor to audit the accounts unless the parties agree.

NOTE 1. — The mortgagees appealed from this decision, but the case was afterwards compromised.

NOTE 2. — The original proceeding by the men for wages was resisted on the ground that they had rendered no maritime service. It was proved that the owner hoped to have the steamer ready soon after the men were hired, and that they were engaged in good faith to navigate her, and did serve on her trial trips. While waiting, they were lodged on shore and had board wages. LOWELL, J.: The service was that of seamen, as much so as if the men had served at sea. Their demand is not in the nature of damages for not being sent to sea, but wages for sea services which they were constantly ready to perform, and did perform, so far as they were needed in port. Even in England, when the admiralty jurisdiction was at its lowest, it is doubtful whether such an action would have been prohibited: *Wells v. Or-*

Re Hammond and Coolidge.

man, 2 Ld Raym. 1044; *The Bulmer*, 1 Hagg. 167; *Mills v. Gregory*, Sayer, 127. And by our law the men have performed actual maritime service in the trial trips: *The Sarah Jane*, *supra*, 203.

C. G. Thomas, for the libellants.

L. S. Dabney, for the claimants.

Re HAMMOND AND COOLIDGE.

OCTOBER, 1869.

A merchant who has failed to keep proper books of account is not entitled to a discharge in bankruptcy, although the fault is wholly with his book-keeper. The law puts upon the merchant the duty of seeing that the books are properly kept, under pain of losing his certificate.

An omission to write up a merchant's books for a reasonable time while the books are wanted for use in court, the accounts being kept on slips of paper ready to be inserted in their proper places, is not a failure to keep the books.

Otherwise, of an omission without excuse, or for an unreasonable time, or a failure to procure new books if the old books are lost. Entries on separate loose slips of paper would not, as a permanent system, be keeping books.

A consignment of goods for sale is not a pledge or conveyance of them within section 29 of the bankrupt law; but where the allegation in specifications of objection to the discharge was of a consignment to one out of the district, in contemplation of bankruptcy and with intent to keep the property from the assignee; *held* (the defendant having waived all questions of mere form), a sufficient charge of a removal of the goods from the district with intent to defraud creditors.

If a bankrupt, having a knowledge of the existence of his books, and of their place of deposit, refuses to give them to his assignee, and denies their existence, this is a concealment of the books within section 29.

JURY TRIAL ON OBJECTIONS TO THE BANKRUPT'S DISCHARGE. — On the law points involved in the case the charge was substantially as follows: —

LOWELL, J. The question whether the bankrupts kept proper books of account is one of fact. The law requires that a merchant or tradesman should keep such books as, considering the nature and circumstances of his trade, are necessary for exhibiting to a person of competent skill the true state of his dealings and affairs. The charge here is that during a certain specified period, about six weeks before the business stopped, the defendants kept

neither a cash-book nor a shipping-book. You are relieved from embarrassment in the inquiry whether these books were necessary, because it has been testified on both sides, and is not denied in argument, that these books were kept during some years, and were necessary; though of this you will judge, as of all other facts. No doubt the law means not only that books of the right kind should be kept, but that they should be kept properly; that is, with such reasonable fulness and accuracy as to enable the assignee to acquire the information which books are intended to disclose. But the specification here merely is that no books at all were kept of the sort mentioned during the period alleged, which would not be a sufficient allegation that such books, though kept, were imperfect, because it would not sufficiently point out to the defendants the accusation which they were expected to meet.

You will remember the evidence. It tends to show that for a considerable time, ending with the actual stopping of the business, the books named were not in the hands of the book-keeper, and no entries were made in them. It is said that certain entries were made on pieces of paper, and both sides have asked for rulings concerning such memoranda. As applied to this case, the only ruling I can give is this: That an accidental and temporary omission to make entries in proper books would not be within the law, as, for instance, if the books were taken from Natick to Boston to be used in an important trial, and while they were detained, the clerk made full and accurate memoranda of all the transactions of the firm in such a way that he would be able to write up the books immediately on their being returned to him, it could not be said that the books were not kept. This is merely by way of illustration, and is said to have actually occurred in the month of December. Afterwards, it is said, the books were lost. If so, and if there were no reasonable expectation of finding them, or if they were not found within a reasonable time, it was the duty of the bankrupts to supply their place with others. The question turns on the time that you find the books to have been gone, the intent and good faith of the parties, and whether they did all that prudent business men, intending to keep their accounts accurately, would naturally do. A temporary, accidental omission, in good faith, and for a reasonable time, to make the entries, would not be

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a failure to keep the books. But a cessation to keep them, on purpose, or for an unreasonable time, would be.

I cannot rule, as requested by the bankrupts' counsel, that if they employed a clerk whom they considered competent, and left the whole charge of the books to him, they are to be discharged. The law does not require traders to keep a book-keeper, but to keep books; and they are responsible to see that it is done. It is not a question of intent at all, or of due diligence, excepting to the extent before explained. Nor can I rule that entries on numerous slips of paper, each entry on a separate slip, is a keeping of books, under the law. As I have before ruled, it might do for a short time in the absence of the books; but as a system or policy of a permanent character, no. It is not important whether the book is bound or not; and accounts might be kept on sheets carefully preserved together. You will decide what was done in this case, and whether it amounted to a keeping of the books during the time or about the time specified, under the rules above laid down.

The concealment of the books from the assignee does involve the question of intent. If the books were accidentally lost before the bankruptcy, there can have been no such concealment. If they were not lost, but within the control of the defendants, and were not given up on demand, but their existence denied, the charge is sustained.

The charge that certain goods were, at certain times, consigned to Mr. Henry, of Louisville, Kentucky, in contemplation on the part of the defendants, of bankruptcy, and with intent, &c., is relied on as a transfer of property, and as a removal of property from the district. In my judgment the clause concerning any pledge, payment, conveyance, &c., does not include a consignment, which would not ordinarily change the title, but be merely the employment of an agent. It is not shown that Henry had made any advances on the goods, or had any pledge of them. It does seem sufficient, in substance (the defendants having waived objections of form), as a charge of a removal from the district, and if it was done with a view at the time by the defendants of becoming bankrupt and having their property distributed under the law, and with intent to keep the property from their assignee, that is, in substance, a sufficient charge that it was to defraud their creditors. As all

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this is alleged, though the contemplation of bankruptcy was not a necessary allegation, it must be proved. You will say therefore, whether, when these acts were done, if you find that they were done, it was in the view and with the intent charged.

H. W. Paine & R. M. Morse, Jr., for the creditors.

E. Avery, for the bankrupts.

Ex parte DAVENPORT. — Re FORTUNE.

OCTOBER, 1869.

The assignee of a *chose in action* not negotiable, may prove it against the estate of the debtor in bankruptcy upon his own deposition, without adding the deposition of his assignor.

The deposition should show the name of the original creditor, in order to enable the assignee in bankruptcy to compare the debt with the books and accounts of the bankrupt.

If, as matter of form, the proof should stand in the name of the assignor, the assignee has all the rights of a creditor in the bankruptcy, including the right to take any action in the name of his assignor, but at his own expense, that may be necessary.

LOWELL, J. One Davenport presented for proof against the bankrupt's estate an account for goods sold to the bankrupt by one Hovey, which account was duly assigned to Davenport, for value, before the bankruptcy. The deposition of Davenport only was produced. The register disallowed the proof, and two others offered under like circumstances; and, at the request of the parties, certified to me the question, whether they should have been allowed. The depositions are not sent up; but I understand them to have been sufficient in form, and that they were thought defective in substance because Hovey gave no deposition.

The important powers and rights given to creditors in bankruptcy in relation to the course of proceedings are to be exercised by the real creditor. No doubt could be entertained that the person entitled to vote for assignee, and to examine the debtor, and to oppose or assent to his discharge, is the assignee for value of a *chose in action*, and not his assignor. For though the assignor may be in some sort a trustee by necessity, for the person to

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hom he has transferred the debt, yet he has the merest technical title, with no real power over the debt in any court.

I suppose the question intended to be submitted is, whether the assignor must not join in the deposition before such a debt shall be admitted to proof. The English practice has been so, and the reason given for it is that the assignor should certify whether he has any security: 1 Cooke, B. L. ch. 6, § 6 (3d ed.), p. 182; 1 Griffith & Holmes, B. L. 714. So in the case of a trustee and *stui que trust*, it is usual for both parties to join. But under our law it seems to me to be sufficient that the true and *bonâ fide* holder of the debt at the time of the bankruptcy should make the affidavit; such is the fair interpretation of the sections upon this subject; and the oath is so full and searching as to include all satisfaction and security held or received by the affiant or by any other person, in respect to the debt affirmed to; and there would seem no reason why the assignor should be joined in the case of a debt not negotiable at common law, more than of one that is negotiable. It is a question of fact, whether the debt has been paid or secured, in whole or in part, and a question as to which pertinent evidence is always admissible. But the *primâ facie* case is made out by the affidavit of the real creditor.

As to the matter of form, however, it is proper to say that perhaps an appeal to the circuit court from the disallowance of such claim, ought by analogy to the rule of the common law still prevailing here, to be taken in the name of the original creditor, and would be right, in all cases, that the fact of the assignment, and date, &c., should appear in the affidavit and in the record, in order that questions of set-off and security should be met and decided upon a full knowledge of all facts.

My answer is, that a deposition by an assignee for value, before bankruptcy, of a *chose in action*, is sufficient to entitle him to prove his debt, and to be considered the creditor in respect to such debt, to all intents and for all purposes. That his deposition should show the fact and date of the transfer, and the name of the original creditor, and that such assignee of a *chose in action*, by proving, should have the right to take any such action in the name of his assignor, but at his own expense, as he may be advised.

Certificate accordingly.

Ex parte Morrow. — Re Young.

Ex parte J. H. MORROW. — Re J. B. YOUNG.

NOVEMBER, 1869.

A stipulation in a lease that the premises should be occupied as a boot and shoe shop, and that all fixtures of every description should be put in by the lessee, and might be removed by him at the end of the term, provided he should have kept all his covenants, and not otherwise, and should not be removed during the term without the consent of the lessor, does not purport to give the lessor a lien on the mere furniture, though it should be fitted to the shop, if not annexed to the freehold. *It seems*, that if such a stipulation did include furniture, it would not be valid against an assignee in bankruptcy before entry and possession taken by the lessor. Such a stipulation creates a valid lien on trade fixtures annexed to the freehold, and the assignee can take them only on payment of the arrears of rent.

THE bankrupt held a lease of a shop and cellar in Roxbury, rent payable monthly, and owed several months' rent at the time his petition was filed. The assignees surrendered the premises to the lessor, without prejudice to their claim for certain gas fixtures, shelving, and sets of drawers, put in by the lessee, and to which the lessor asserted a title. These were sold by consent, and the dispute was submitted to the court on an agreed statement, by which it appeared that the lease provided that the premises should be "used as a boot and shoe store, and all fixtures of every description are to be put into said premises by said lessee, at his own expense," with the right to remove at the end of the term such as could be moved without injury to the premises, provided the lessee should have kept all his covenants, but otherwise not, and that none of them should be removed during the continuance of the term, without the consent of the lessor.

J. D. Ball, for the assignees. The terms of the lease are intended to secure the landlord, but they cannot have that effect, because they amount to neither a mortgage nor a pledge, and the chattels remained in the possession of the lessee.

J. C. Park, for the petitioner. The meaning of the covenant is that all the fixtures put in by the lessee shall be a security for the rent, and this is binding on the assignee in bankruptcy, and applies to every thing now in dispute.

LOWELL, J. I do not find that this lease purports to give the petitioner a lien on the furniture, but on the fixtures only. No doubt the word fixtures may be often used in a broad sense to in-

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clude all fittings, whether affixed to the realty or not, but I do not consider such a meaning attaches to it in this case. The parties are stipulating concerning the demised premises, and they agree that the lessee shall put in the trade fixtures, and may remove them at the end of the term, if he can do so without injury to the freehold, and if all his covenants have been kept, but not during the term. It is easy to see that the lease was not written by a lawyer, but this clause is very well calculated to express the contract that the tenant's right to remove the fixtures should depend on his compliance with the covenant to pay rent. Taken in its ordinary sense, and in connection with the proviso that in case of breach, the petitioner might enter and expel the lessee and remove his "effects," it must refer merely to fixtures strictly so called. If the parties intended to give the landlord a lien on those articles which were merely fitted to the room but not affixed, they ought to have made this intent clear, and to have regulated the matter more carefully. But it is very doubtful whether such a covenant would have created a lien that could have been enforced against the assignee. Distress for rent has no place in the law of Massachusetts, and an agreement that chattels on the premises shall be at the disposal of the lessor as security for rent is not valid against creditors of the lessee before entry: *Butterfield v. Baker*, 5 Pick. 522. The bankrupt law preserves all liens, but it does not undertake to enforce a mere covenant of this kind which by the law of the place creates no valid lien.

So far as the fixtures are concerned, I see no objection to the lien. The act of affixing them to the freehold takes them out of the category of chattels, and is notice to creditors and to all the world, that the right of removal will depend on the contract between landlord and tenant. The right of the tenant to remove trade fixtures may well enough be called rather a privilege than a property, and it is one that he may lawfully waive or modify by the terms of the lease, without the form of either a pledge or a mortgage.

Applying these rules to the evidence, it is found that the sets of drawers, which were carefully fitted to the shop, but in no way fastened to it, are furniture, and belong to the assignee; the other things, which are trade fixtures, he can take only on payment of the arrears of rent.

So ordered.

DISTRICT COURT,

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THE ROBERT L. LANE.

NOVEMBER, 1869.

When a voyage is necessarily abandoned in a foreign port, after the vessel has been repaired there, the master has power to hypothecate the ship, for the purpose of getting her back to the owners.

The ship belonging to Glasgow, was thus hypothecated at Honolulu, for the only voyage which could be obtained, which was to New Bedford. It appeared that the vessel had been proceeded against in the admiralty at Honolulu, and that the master believed, and had reason to believe, that she would not sell for more than the amount of the liens upon her for repairs. *Held*, he had the right to hypothecate the ship, by bottomry, for a voyage to New Bedford.

A bottomry bond is not vitiated by the stipulation that the cost of insurance shall be included in the sum to be paid by the ship in case of her safe arrival. The master (since deceased) had written to his owners, and the letters were not produced by either side, and were not within reach of the libellants: *Held*, that the master would be presumed to have made full and true communication to his owners.

The ship and freight being insufficient to pay the bond, costs were not given against the claimants personally, they being mortgagees out of possession, and there appearing some reason for their contesting the bond.

LIBEL IN A CAUSE OF BOTTOMRY. — This large and valuable ship was built in New York, but owned in Glasgow. In September, 1867, she was lying at Acapulco, on the coast of Mexico, and Silas P. Martin, then in New York, was appointed master, and directed to go to Acapulco and take command, and thence proceed to Honolulu, in the Hawaiian Islands, to procure tools and other necessities, and to hire workmen for the purpose of obtaining guano at Howland's Island, a place in the Pacific Ocean under the dominion of the Hawaiian government. The guano was to be made ready to load this ship, and others which the owners intended to send out for return cargoes to Europe. The ship was to return to Honolulu, and thence to Howland's Island, and while lying there received damage which made necessary a return to Honolulu for repairs, in April, 1868. The survey showed a damage estimated at \$15,000 in gold, and the repairs were in fact made at something less than that sum. Captain Martin wrote to his owners, and they promised funds, but sent none; and the vessel lay in the port of Honolulu, unable to proceed on her voyage, from June, when the work was finished, until the sixth of

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October, when the shipwrights filed a libel in the admiralty against the ship.

The master now abandoned the original adventure and undertook to get his vessel home. He made a contract with the libellants, merchants of San Francisco, by which they undertook to pay the claims on the ship, which now amounted to \$24,000 in gold, and all necessary expenses in port, and for fitting and preparing the ship for sea, and to charter her for a voyage to New Bedford, taking this bottomry bond, with interest at one per cent a month, and the actual cost of insurance. Captain Martin was very ill of consumption, and in this matter acted through and with the aid and advice of William L. Green, an English merchant resident at Honolulu, and some time British consul and Lloyd's agent there. He now, with Mr. Green's approbation, and that of the British consul, appointed Dennison Hempstead to be master, and the latter superintended the fitting and loading of the vessel. She was ready for sea on the second of January, 1869, on which day the bond was given for \$29,305.78 in American gold coin, which is the currency of those islands, with interest and insurance payable in fifteen days after the ship's safe arrival at New Bedford. It was further conditioned that if the sums should not be paid within the fifteen days, an additional premium of ten per cent should be charged and paid. The libel was filed June 26, 1869, after the expiration of the fifteen days, and the several sums demanded, including the additional premium, and reckoning gold at 139, amounted in currency to a little more than \$50,000. The owners did not appear, but the claimant, who was a mortgagee, required proof to be made of all the facts propounded in the libel, which required depositions to be taken at Honolulu.

T. D. Eliot & T. M. Stetson, for the claimants. 1. The bond is void on its face, because it contains no sea risk, and does provide for insurance at the expense of the ship, for the benefit of the lenders. 2. The master, after writing to his owners, had no authority to borrow money without their express assent. 3. When the original adventure was ended, the power of the master to borrow was gone; and he should have suffered the ship to be sold by the marshal, or, at most, have made some arrangement to send her to San Francisco for sale, and not to the Atlantic coast with a cargo.

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4. If he had the power, yet his exercise of it was not proper, because the voyage was so plainly imprudent and ill-advised as to vitiate the bond.

J. C. Dodge & Marston & Crapo, for the libellants.

LOWELL, J. I do not understand that there is now any dispute concerning the necessity of the repairs, but only about the propriety of giving the bond. It is not necessary to decide whether a sea risk is essential to the validity of an express hypothecation bearing marine interest, and whether this court would have jurisdiction of such a contract. It is enough to say that the decisions founded on the usury laws may require some modification, since those laws have been abolished in many maritime States, including both England and Massachusetts, whose laws are concerned with this case; and that the admiralty jurisdiction as established in this country, may perhaps extend to some such hypothecations, though not, it seems, to a mere mortgage.

In this case there was a marine risk, for the payment is to be made in fifteen days after the arrival of the vessel at a safe anchorage in New Bedford, or in case of her loss, "such an average as shall, by custom, become due on the salvage." It would not be easy to express a sea risk more plainly: *The Nelson*, 1 Hagg. 172; *Simonds v. Hodgson*, 6 Bing. 114; s. c. in error, 3 B. & Ad. 50. *The Indomitable*, Swabey, 446, was a case of hypothecation resembling a mortgage, to secure a bill of exchange, and the payment was not at all dependent on the voyage, though the contract did look to moneys to be earned on a succeeding voyage. The only point of resemblance is, that the borrower was to pay for the insurance; and on that point the learned judge says: "I agree that if there were a maritime risk, directly stated, the mere fact that the insurance was to be made by the lenders, and paid for by the borrowers, might not invalidate the bond." p. 452. He then refers to *The Nelson*, 1 Hagg. 176, as the only case to that point, and as being a very peculiar one, and says the point was taken in argument, but not noticed in the judgment. The case of *The Nelson*, as reported, does not give the point either in argument or judgment; but as Dr. Lushington was of counsel in that case, no doubt he states the fact correctly, and the case then becomes a precedent favorable to the libellants. There are, however, other

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cases in which the fact appears, and in one of which the premium of insurance was held not to be a valid item of the account, which made up the principal of the bottomry bond, but the bond itself was upheld: *The Boddingtons*, 2 Hagg. 422; *The Rhadamanthe*, 1 Dods. 201. I do not see any legal difference between the bottomry holder charging a sufficient premium to cover the risk, and then insuring his interest, which is every day's practice, and his charging the precise premium which he is obliged to pay. This sum, like all the rest, is at the risk of the voyage.

Coming now to the question of the master's power, I cannot hold that he must wait for express permission to hypothecate. Assuming as we are bound to do on this evidence, in the absence of the letters which the owners might have furnished, that the communications which it is admitted the master made to his owners, were full and sufficient, their silence and neglect authorized him to take such measures as were most expedient, and such as a prudent master would take who could not communicate with his owners. His alternative was to sell or hypothecate; and it cannot be maintained that he had a more ample implied authority to sell than to hypothecate. On the contrary, he had less; for hypothecation on its face is a sacrifice of part, while a sale usually sacrifices the whole.

But it is insisted that when the original voyage was gone, the power to hypothecate went with it. This is a mistake. The powers of the master are to be exercised in all cases for the benefit of the owners, and if his voyage is ended in a foreign port of necessity, his duty is to return the ship to the owners by the best means at his command, and his powers for that purpose are as ample, and his duty as imperative as before. The compendious proposition of Judge Story, cited in argument, that a master can only hypothecate for effectuating the objects of the voyage, and for the safety of the ship, cannot be construed to exclude a voyage of necessity, and the beneficial safety of the ship to her owners. To such a case are fully applicable the memorable words of that other great master of admiralty law: "Necessity creates the law, it supersedes rules, and whatever is reasonable and just in such cases, is likewise legal:" *The Gratitude*, 3 Rob. 266.

The argument that the ship should have been sent to San Francisco, admits the power of the master, and only questions the manner of its exercise; and concerning that, it is only necessary to

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say that I have seen no evidence nor any reason to believe that such a voyage was possible excepting in ballast, or, if undertaken, would have been more beneficial to the owners than that to New Bedford.

And this brings me to the last point taken to the general merits of the case, that the voyage to New Bedford was so plainly imprudent, that the bond cannot be upheld. This point was so strongly insisted on, and with such apparent confidence, that I have given it very careful examination. The undertaking is to show by a careful analysis of the accounts, that after applying the charter-money towards the liquidation of the libellants' debt, the ship remains somewhat more incumbered at New Bedford than she was at Honolulu. I do not find this fact to be shown. But in truth this is of slight importance, because it is clear that the master greatly feared a forced sale at Honolulu, and believed it would be entirely ruinous, so that nothing would be left for the owners, and there is no evidence that this belief was unfounded. If this be so, the ship cannot be worse off here than there. His intention was to send his vessel towards home, within reach, so to say, of his owners, and where they would have some opportunity to redeem her, or at least to see that she was not sacrificed; and the appearance of the claimants here convincingly testifies that this object has been accomplished. These two considerations, that to remain was probable ruin, and to send the ship so far towards home gave the persons interested another chance, are amply sufficient to vindicate the conduct of Captain Martin, whether it turns out that the chance is as valuable as he supposed it or not. It is said that there is no evidence that New Bedford is a better market for ships than Honolulu; but I can take notice that it is a larger and richer town, a good deal nearer Glasgow and other markets than is Honolulu. Considering these circumstances, and that the only freight offering was to New Bedford, I cannot doubt that the course taken by Captain Martin, and followed up by Captain Hempstead, not only appeared to be but was that of a prudent and competent master, and well calculated to serve the interests of his owners.¹

Bond pronounced for.

¹ The judge said that some of the items of the account might be invalid, especially the ten per cent premium; but these points became unimportant because the vessel brought a price insufficient to pay the undisputed items.

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libellants moved for costs to be taxed against their stipulation, the proceeds of sale of the ship went to pay the bond in full.

J. I regret that so few cases are to be found in the states on the subject of costs in the admiralty. As a general rule, the prevailing party recovers his costs in admiralty and other courts. But the judge has a discretion to divide them and use them altogether. There are many cases in which a libellant who appeared to have a good cause of action, and has been decided upon a doubtful point of law, or even of fact, has had his case dismissed without costs. There are several such in bottomry where the lender has advanced his money in good faith, but the master had done wrong in giving the hypothecation.

Where the libellant prevails, the most usual decree is for his damages and costs. If the *res* is sold, by order of court, and the proceeds are insufficient, we must look carefully at the position and conduct of the parties, and the nature of the cause. Some causes of action, as those of affreightment, collision, wages, &c., arise out of contracts or torts in which the libellant is personally bound by the acts of the master, and the ownership of the *res* forms no ground for exonerating him, but by virtue of some statute limitation of his liability; and under such statutes he is usually held for costs. But in bottomry and salvage causes, the property alone is liable, and there may be some cases in which one having an interest may incur liability without subjecting himself personally to costs.

Consider this to be such a case, for these reasons: The claimants were the first mortgagees of the ship, and were not in possession and so far as appears, had nothing to do with the voyage or employment of the master, and were not consulted or notified when the money was raised by hypothecation, or the substituted mortgage was obtained. They found their vessel in a foreign port, out of the course of her employment, and hypothecated to the charterparty. Such a state of affairs raised questions of law and fact which they might reasonably litigate to the extent they have done, and it is not personal liability for costs: *The Kennersley Castle*, 3 D. & W. 39.

The decree will be for costs, but not against the claimants and stipulators personally.

Ex parte Kelty & al. — Re Storms & Co.

Ex parte J. B. KELTY & AL. — Re W. R. STORMS & Co.

NOVEMBER, 1869.

A pledgee in good faith and for value of promissory notes transferred to him before maturity can prove them for their full amount against the assets in bankruptcy of the promisors, whatever may have been the equities between the promisors and the pledgor.

But if there are such equities which would prevent the pledgor from proving, then the pledgee can receive in dividends only the amount for which he holds the notes in pledge.

Where such a pledgee, after the bankruptcy of the promisors, settled with the pledgor who was insolvent, and in the arrangement took the notes as payment for a certain sum, and the arrangement appeared to have been made in good faith, *held*, he might still prove for the face of the notes and receive dividends to the extent of the sum paid for them.

BANKRUPTCY. — The petitioners, merchants of New York, lent eight thousand dollars to one Blake, and took his note for that sum, and at the same time received from him as collateral security five notes of W. R. Storms & Co., in all amounting to considerably more than eight thousand dollars. These notes had, in fact, been given by Storms without the knowledge of his partner, and merely for the accommodation of Blake; but of this the petitioners had no notice. Before any of the collateral notes became due, the petitioners sold two of them, and indorsed the proceeds of sale upon Blake's note, which reduced the amount due from him to about three thousand six hundred dollars, for which they still held three notes of Storms & Co., amounting to seven thousand three hundred dollars. After the bankruptcy of Storms & Co., and after all the collateral notes were overdue, the petitioners made a settlement with Blake by which they took the notes of Storms & Co., at ten per cent of their nominal value, and received the remainder of their debt in cash from Blake, who has since become bankrupt.

The petitioners offered to prove the three notes against the joint estate of W. R. Storms & Co., with leave to receive full dividends. The assignees objected that they could only prove for ten per cent of their amount, being the rate at which they bought them.

LOWELL, J. I know of no law for restricting the proof on a note to the amount paid for it. If the argument for the assignees is sound, that the petitioners are to be in the position of purchas-

Ex parte Kelty & al. — Re Storms & Co.

ers of paper past due, they cannot prove at all, because the notes were void in the hands of Blake. If, on the other hand, they hold the position of *bonâ fide* purchasers or pledgees for value, they can prove for the full amount.

The general rule at law is that a pledgee of a negotiable note may recover the full amount: *Bowman v. Wood*, 15 Mass. 534; *Tarbell v. Sturtevant*, 26 Vt. 513; *Manhattan Co. v. Reynolds*, 2 Hill, 140. And the rule is the same in bankruptcy. There are many cases at law in which the holder can only recover the amount which he has honestly advanced on or paid for the note; as, for instance, if the pledgor, as here, had only borrowed the name of the promisor, because as the pledgee would be trustee of the pledgor for all sums recovered above his debt, and as the pledgor would be obliged to refund this surplus the moment he received it, his trustee might be restrained from receiving it. But in bankruptcy the proof of a debt is not its payment, and the rule there, founded on the same equities, is that the pledgee proves for the whole amount, but receives dividends only to the extent of the debt for which he holds the security. This is exact justice, and is well-settled bankruptcy law: *Ex parte Bloxam*, 6 Ves. 448, 600; *Ex parte Fairlie*, 3 Dea. & Ch. 285.

At the first meeting of creditors in this case, then, the petitioners could have proved for the face of their collateral notes, and might have received dividends up to \$3600. If they afterwards received payment of their debt and interest from Blake, they would have been restrained by the court of bankruptcy from taking any thing out of this estate; if they had been paid in part, they must give credit for that part. The assignees contend in effect that the settlement between Blake and the petitioners was a payment of their entire debt. But, upon the evidence, I cannot so consider it. So far as these petitioners were concerned, Blake and the bankrupts did not occupy the position of principal and sureties. The petitioners had the right to get what they could out of both, and there is nothing in the case to lead to the belief of any fraud or of a trust for Blake in the settlement, but rather that he paid all that he was able to pay, and that the petitioners expressly reserved their right of proof against Storms & Co., because they found this to be the best arrangement for themselves. While I agree that

The L. T. Knights.

the rights of the petitioners are not to be enlarged after the bankruptcy, yet it would be unjust to hold that their good title as pledgees was merged in a defective title as purchasers. The rule of equity is that the party may hold by his best title. I think, therefore, the petitioners should stand as if they were still pledgees who had in good faith recovered what they could from the pledgor, and should have proof for the full amount of the notes, but should be permitted to receive dividends only to the extent of the ten per cent, or seven hundred and thirty dollars, with interest from January 14, 1869. *Order accordingly.*

J. C. Park, for the petitioners.

B. F. Brooks, for the assignees.

THE L. T. KNIGHTS.

DECEMBER, 1869.

A coal-laden schooner was found derelict at sea about fifty miles from Long Island, and brought into Newport by the mate and two men from the coasting schooner *Fanny Blake*. The salvage service occupied thirty hours, and required a good deal of labor and some risk, as the derelict had holes bored in her hull, which were not discovered for many hours. On a value of \$6400, the salvage awarded was \$2500.

Neither the owners of the *Fanny Blake*, nor her master, nor her steward, made any demand for salvage, and there was evidence that the two latter, and perhaps some others, had been guilty of embezzling furniture and stores from the derelict. The libellants not concerned in the fraud were awarded the same shares that they would have had in the absence of any embezzlement.

A boy who was an actual salvor, and who had refused to join in plundering the vessel, but had taken two articles of very trifling value "as keepsakes," which he had offered to return to the claimant, was awarded a less share than he would otherwise have had.

LIBEL for salvage, promoted by the first mate and two of the crew of the schooner *Fanny Blake*. The L. T. Knights was observed early in the morning of Sunday, August 29, 1869, by the libellants and others on board their vessel, at sea, about fifty miles from Long Island, in apparent distress. On boarding her she was found to be coal-laden and derelict, with about three feet of water in her hold. Snow, the mate of the *Fanny Blake*, and two men, one of whom was the libellant Folio, undertook to bring her to

The L. T. Knights.

Newport, and succeeded in doing so in about thirty hours. They were kept much of the time at the pumps until late Sunday night, when they discovered and partially stopped the leak, which was occasioned by holes bored in the hull of the schooner, though when and by whom was not discovered. The actual salvors incurred some risk, and both vessels were short-handed after the salving crew had been sent on board the schooner. While the vessel was lying at Newport in charge of the salvors, some of them embezzled furniture and stores, and carried them on board the *Fanny Blake*. The evidence tended to implicate the master and steward of that vessel in this misconduct. No demand for salvage was made by these men nor by the owners of the *Fanny Blake*.

LOWELL, J. The rule in such cases is, that the forfeiture of salvage does not attach to those who have had no part either in the fraud or its concealment. I speak of cases where the evidence is clear and decisive; for it may well be, that the burden of discrimination may lie upon the salvors generally, when embezzlement is shown. The evidence here does not implicate Snow nor Legg, and they should have the same allowance, and no more, as if the distribution were made to all the salvors; for the forfeiture enures to the benefit of the owners of the property, and not to that of the co-salvors: *The Rising Sun*, Ware, 378.

The question concerning Folio's conduct is not so free of doubt. He is a boy of eighteen years, whose service was meritorious, and whose statements both in and out of court appear to have been frank and consistent. His story is, that he took no part in the spoliation, but remonstrated with Ward against it, and was silenced by the asserted authority of the master. That seeing Ward packing articles in a box, he asked him to put in a log-glass for him as a keepsake. That he told Captain M'Intire, the claimant and owner of the *L. T. Knights*, of this, and offered to pay for the glass, but was told that it was of no consequence. It would seem, too, that he had a small earthen dish; the total value of both articles being less than half a dollar. It is of no consequence that a salvor has made nothing by a fraud, if he is a party to it; but in this instance there is room for a charitable doubt, considering all the facts and circumstances, whether this libellant's acts really amounted to embezzlement, in intent; though, perhaps, technically

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so in law. I am satisfied that he was no party to the main theft, but opposed it; and taking his whole conduct and declarations together, I feel authorized, though with some hesitation, to say that his conduct may be regarded as heedless rather than dishonest, and as a warning against even heedless conduct in this matter, to diminish, but not wholly forfeit his salvage.

The question of amounts remains. A meritorious case of saving a coal-laden derelict, likely to have foundered at sea, is one for a proportionally large compensation. The total value saved was \$6400. I consider the total salvage reward should be about \$2500. Of this I assign to Peter Y. Snow (the mate who conducted the enterprise), \$400; to George V. Folio (an actual salvor), \$200; to George B. Legg (who remained on board the *Fanny Blake*), \$150. The libellants are to have costs. The remaining salvage is forfeited to the claimants.

C. T. Bonney, for the libellants.

R. D. Smith, for the claimants.

W. C. CARTER v. JIREH SWIFT, JR., & AL.

1869.

Part of the proceeds of a whaling voyage were received in gold, and part in currency, and some advances were made to the libellant in gold. The account of the voyage was made up wholly in currency, the owners allowing and charging the premium on gold. *Held*, it was properly made up.

The libellant was to have a lay of one forty-second part of the catchings. If the account was so made up that he received this share, it was rightly made up, whether in one currency or another.

The libellant could not require that the gold dollars paid him at San Francisco should be charged at their face only, if the result would be to give him more than one forty-second part of the actual net returns.

The respondents having offered a certain sum before suit, based upon the mode of accounting adopted by the court, and no question of the sufficiency of the tender, in point of form, being made, the libellant was refused costs, unless it should turn out that the respondents had made a mistake in their computation, as to which the libellant had leave to go to an assessor.

WAGES. — The libellant was entitled to a lay of one forty-second part of the net proceeds of the whaling voyage of the bark *Camilla*,

Carter v. Swift & al.

for the time that he served on board the vessel, as compared to the whole voyage, after deducting the advances already made him, and the only question raised in the case was, whether the respondents could charge him with a premium on the gold coin paid him at San Francisco. The owners of the vessel made sale of a part of their cargo for gold, at San Francisco, and of a part for gold at home, according to the custom of the trade, and of the greater part for paper, and rendered their account wholly on a paper basis, allowing and charging the premium on all specie received and paid.

LOWELL, J. The voyage appears to have been properly made up. If the owners were obliged to account only for the number of dollars received without regard to currency, it would be in their power to sell the whole cargo for gold, and account for it in paper. This a court of admiralty could not permit, if it were possible legally to avoid it. If the account is to be reformed, it must be reformed on both sides, and this might work great injustice to those of the crew who had not received large advances, though it might happen to be favorable to this libellant. The contract of the libellant was for one forty-second part of the proceeds; and in whatever currency the account is made up, if he receives payment in the same currency, he receives his fair share. I agree that in the naked case of a payment of so much money, the contract being silent as to the currency, if the debtor chooses to pay it in specie he cannot ordinarily ask for a credit for more than the number of dollars which he has paid. But here the question is of a fair settlement of proportions. An admiralty court will look at the fact, and if the libellant asks to have the account so adjusted as to give him more than one forty-second part of the actual net returns, it will refuse his request. If he had been put in possession of one forty-second part of the oil and bone, worth in gold dollars at San Francisco a much less proportion of what the whole cargo would have brought at New York or New Bedford, in paper, as shown by what the remainder did bring, it is clear he could not now recover more; and, so far as that payment goes, this is substantially what he received. A certain part of the cargo was disposed of at San Francisco, for gold, and the libellant got a share of the gold; reckoning the price of the whole cargo, wherever sold, in paper,

The Nineveh.

and reckoning his payments in the same, he is now entitled to only what the respondents are admitted to have offered him, unless there has been a mistake in computation. The case more nearly resembles *Tufts v. Plymouth Gold Mining Co.*, 14 Allen, 407, than *Bush v. Baldrey*, 11 Allen, 367, which was relied on in argument.

The libellant is to recover the sum offered him, and interest. It was agreed that the computation might be revised by an assessor if the libellant desired it, and if it should turn out that he was not offered enough, he will have costs; otherwise not.

F. L. Porter, for the libellant.

Decree accordingly.

W. W. Crapo, for the respondents.

THE NINEVEH.

1869.

A submission to three referees does not authorize an award by two only.

An award in a case of collision which decides the liability, but not the damages, is not valid, because not final.

Where such an award had been rendered under a rule to three arbitrators, and one of the three refused to act further, the award and rule were set aside.

Where an agreement to refer was made before answer filed, the claimant should have leave to answer without terms, after the rule is set aside. An answer was not necessary while the case was before the arbitrators, unless ordered by them.

THIS was a cause of collision by the master of the *Aurora* against the *Nineveh* for damage received in Massachusetts Bay. The libel was filed March 20, 1868, and a claim was duly filed and the vessel released on bail. On the twenty-fifth of March, before answer filed, the parties agreed to refer the cause to three arbitrators, and a rule of court was taken out the next day which followed exactly the stipulation of the parties, and referred the cause to the three without express power to the majority to decide the dispute if the whole should be unable to agree. The arbitrators met and heard the parties, and signed an award that all damages, costs, and expenses should be divided, and be paid by the owners of the two vessels equally, and that in case they should not agree on the amount, the claims should be submitted to the referees who would pass upon and establish the same by a supplementary

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award. The parties could not agree upon the damages, and one of the referees refusing to act further, the two who remained proceeded to assess the damages, but made no award, and asked the instructions of the court in the premises.

The libellants now moved that the award, so far as made, may be accepted, and the case be recommitted to the two to find the damages. And the claimants moved to have the award and rule set aside, and that they have leave to file their answer and proceed as usual.

LOWELL, J. It is well settled that a submission to three, without more, does not authorize an award by two only: *Towne v. Jaquith*, 6 Mass. 46; *Green v. Miller*, 6 Johns. 39; *Dalling v. Matchett*, Willes, 215. It makes no difference in this respect that the submission is made a rule of court, because the rule is founded upon and must strictly follow the agreement of the parties. It follows that I cannot recommit the report for further action by the remaining arbitrators.

It is equally clear that the award which has been made cannot be accepted. It does not decide the rights of the parties, but is in its nature and on its face a mere preliminary finding,— what we should call an interlocutory decree,— and amounts only to an order or direction to the parties to do certain acts and prepare certain evidence before the next hearing. In legal language, it is not final. The question of damages forms an essential part of the submission, and both parties are entitled to the judgment of their chosen tribunal upon it, as much so as upon the preliminary point of the responsibility of the respective parties.

For these reasons I must order that the rule of reference be vacated, and that the claimants file their answer within a reasonable time. The objection that they ought to have answered sooner cannot prevail, because the agreement to refer, which was filed very early in the case, took away the necessity for an answer, and left the referees to be the judges of what should be required in the way of pleadings, and it is not until the rule is set aside that an answer is needed or could properly have been received. It must, of course, be filed without terms.

Order accordingly.

F. C. Loring, for the libellants.

J. C. Dodge, for the claimants.'

 United States v. Clark.

CIRCUIT COURT.

UNITED STATES v. HUGH CLARK.

1869.

Whether congress has power to punish a fraud committed by a debtor on his creditor, both residing within the same State, unless the act is done in contemplation of bankruptcy or in connection with some other matter within the federal jurisdiction, *quære?*

Section 44 of the bankrupt act, punishing bankrupts who, within three months before their petition is filed, dispose of goods otherwise than in the due course of trade, with intent to defraud, does not refer to an intent to defraud only the original seller of the goods thus disposed of.

The crime of fraudulently omitting property or effects from a bankrupt's schedule is complete when the false schedule is filed.

An indictment for omitting property and effects from the schedule need not allege that the bankrupt took the oath of allegiance prescribed by § 11 of the bankrupt act.

INDICTMENT for a misdemeanor under the bankrupt act. After a verdict of guilty, the defendant moved in arrest of judgment.

LOWELL, J. The third count of this indictment charges that the defendant, within three months next before the commencement of proceedings in bankruptcy, did dispose of, otherwise than by *bona fide* transactions in the ordinary way of his trade, certain of his goods and chattels, described, which he had obtained on credit, and which remained unpaid for, with intent to defraud a certain creditor. It is objected that congress cannot legislate for frauds committed by a debtor on a single creditor within the same State, unless the act relates to bankruptcy or to some other matter within the federal jurisdiction; and that it has not in fact so legislated in this case. Without now passing upon the constitutional question, which, however, seems to me well taken, I may say that on the construction of the clause under consideration I am of opinion with the defendant, that the scope of the act is to punish frauds on the creditors generally, and not on the particular creditor who sold the goods, nor any other single creditor, and that this count, which charges a fraud on one creditor only, cannot be sustained. If the goods were obtained on credit with intent to dispose of them to raise money, the fraud on the seller would be the most obvious one; but the statute seems to be directed against frauds upon the creditors as a body, and it does not extend to the time of the purchase, but to that of t

disposal of the goods out of the usual course of trade, and at that time the fraud could not injure one creditor more than the rest.

But the verdict cannot be set aside, if either of the other counts is good, for it was a several finding on each of the three charges. The first and second counts both allege specified omissions of property and effects from the schedule of assets filed by the defendant with his voluntary petition in bankruptcy. It is urged that all the acts and omissions mentioned in the first part of § 44 must take place after the proceedings are begun; whereas, the filing of the schedules in voluntary petitions is contemporaneous with the beginning of the proceedings. Upon a careful reading of the section, it appears by no means necessary to hold that the clause beginning, "or shall, with intent to defraud, wilfully and fraudulently conceal from his assignee or omit from his schedule," is qualified by the original limitation of time. It is a new division of the subject, and one which requires no such limitation, because the prohibited acts cannot be committed before bankruptcy. The offence is complete if a bankrupt fraudulently omits from his schedule any property or effects, with the designated intent. An English case was cited to show that a bankrupt ought not to be held guilty of omission and concealment until he had passed his last examination. But that case was decided under Stat. 6, Geo. IV., ch. 16, § 112, which punishes a bankrupt who shall not, *upon his examination*, deliver up his estate, books, &c., and it was held that he had a *locus penitentiæ* until his last examination. Under our act, his duty is to file accurate schedules at the outset, and if they are fraudulently inaccurate he is punishable. We have no last examination of bankrupts, nor any examination at all, unless specially ordered. The whole system is so different in this respect, that the case cited has no relation to the subject of inquiry.

Another objection is, that the indictment does not sufficiently show that the bankrupt court had jurisdiction, and that the proceedings were regular and sufficient. Under this head, again, there was much reliance placed upon the English cases. It is hardly necessary to consider now how far an indictment must go in this direction. We have never adopted the English practice of requiring in every action tried by an assignee evidence of every fact necessary to show that he is rightfully such. The assigment is conclusive evidence of his right; and the bankrupt court is a

Ex parte Faxon. — Re Laurie, Blood, and Hammond.

superior court whose acts are presumed to be regular. In this case, however, enough is pleaded to show that the district court, sitting in bankruptcy, had jurisdiction of the subject-matter and the person, and that proceedings were duly begun. The absence of an allegation that the defendant took the oath of allegiance is more especially relied on. To this there are two answers. *First*, that the omission of effects from the schedule with intent to defraud might be complete before the oath of allegiance was taken; because, although the prescribed form contemplates that the oath shall be annexed to the petition, yet it cannot be doubted that under § 11 it might lawfully be filed at any time afterwards and before further proceedings are had, with precisely the same effect as if annexed. It may be doubted, too, whether the bankrupt can take advantage of the omission of his duty in this respect. Another answer is, that neither the law nor the prescribed form requires that the petition should state whether the bankrupt is a citizen of the United States or not; and this indictment does not show this defendant to be a citizen; and as the statute is equally applicable to resident aliens, while the oath is to be taken only by citizens, there is nothing on the face of this indictment which calls for an allegation that the oath was taken. If the defendant was a citizen, and neglected to take the oath, he must show it in defence. The indictment, in setting out the petition, follows the form of petition prescribed by the supreme court, and actually adopted in this case. *Motion denied.*

M. F. Dickinson, Jr., assistant district attorney, for the United States.

E. Avery, for the defendant.

DISTRICT COURT.

Ex parte FAXON. — Re LAURIE, BLOOD, & HAMMOND.

1869.

If the assignee of a bankrupt elects to take a term belonging to the bankrupt under a lease, he must take with the burden of the accruing rent, and not merely with the obligation to pay from the time he begins to occupy.

Where a petition *in invitum* was filed by the creditors of a firm January 8, 1869, and they were adjudged bankrupts March 26, 1869, and the assignees occupied their

Ex parte Faxon. — Re Laurie, Blood, and Hammond.

store and paid rent therefor, for two or three months from that date, without any express stipulation concerning the quarter's rent which came due April 1, 1869; *held*, the assignees were bound to pay that quarter's rent in full.

THE bankrupts hired a large and valuable shop of the petitioners, and paid the quarter's rent, which fell due January 1, 1869. On the eighth of that month a petition was filed against them in bankruptcy, but was not pressed to an early trial, and the adjudication took place March 26, 1869. The assignees occupied the store for two or three months, and paid rent from March 26, but no arrangement was made between them and the petitioners concerning the rent from January 8 to that day, and the petitioners now applied to have it paid in full by the assignees. The case was submitted on facts agreed.

E. Avery & G. M. Hobbs, for the petitioners.

B. F. Brooks, for the assignees.

LOWELL, J. An assignee in bankruptcy, unless restrained by the terms of the lease itself, may adopt or reject a term, as he finds most beneficial for the creditors, and may take a reasonable time to decide the question. If he takes the lease he makes himself liable, on behalf of the estate, for the rent, including at least that of the current quarter, and this he must consider in determining whether to adopt the lease. The petitioners would have done more wisely, perhaps, to insist on this at the time, but I see no ground for saying they have waived any of their rights. In theory of law, the assignees have been in possession ever since the petition was filed, and not only from the date of the adjudication, which is merely a finding that the petition is well founded. If the quarter-day had come round pending the petition, the bankrupt would have been authorized, if he found it necessary for the best interests of his creditors, to pay the rent in order to save an ejectionment. I have more than once permitted this to be done. And the assignees, by the course they have taken, affirm this to be a case in which such a course was prudent and proper.

The only reported case which I have seen is very short, and gives no reasons or arguments, but the decision agrees with my opinion. There the assignees were required to pay rent from the date of the petition: *Re Merrifield*, 3 B. R. 25. I do not know that any question was raised in that case, to distinguish the date of the petition from that of the adjudication; but if an assignee

Re Williams & al.

is to pay only for his own occupancy, he must be charged from the date of the assignment. There is no argument which will make him liable from the adjudication that does not apply to the date of the petition, which is the true beginning of the proceedings, and the controlling date in all these matters. *Petition granted.*

Re GRANVILLE WILLIAMS & AL.

1869.

So long as partnership debts remain due and outstanding a joint petition in bankruptcy may be brought by or against the partners, notwithstanding a dissolution of the partnership.

If the debtor against whom a petition in bankruptcy is pending is clearly insolvent, he cannot defeat the petition by tendering the petitioning creditor the amount of his debt.

Where a conveyance is made with intent to delay one creditor, it is an act of bankruptcy if its necessary effect is to delay all the creditors.

Such an act may be declared on either as a fraudulent conveyance or as a concealment.

PETITION against the defendants as partners under the firm of G. Williams & Co., alleging that the firm owe more than three hundred dollars, &c., and that the said G. W. & A. W. made a fraudulent conveyance of their property, and did certain other acts within § 39 of the statute. The assets of the firm consisted of the machinery, fixtures, and stock of a small paper-mill, and the leasehold estate on which the mill stood, and one credit of about three hundred dollars. On the 29th of March, 1869, the respondents conveyed all this property excepting the credit to their brother, Emory Williams, by a bill of sale, which was executed at about three o'clock, and recorded at five o'clock on that morning. In the course of the same morning they sent for a person to whom they owed a debt of some sixty dollars, and gave him a note for three hundred dollars dated back about a month, with the agreement which was carried out that he should sue and attach the only debt due then, which was for about three hundred dollars, as above stated. It appeared that a creditor, one of these petitioners, had threatened to sue them by noon of that day unless they gave him security. It was admitted that the giving the note and causing it to be sued were for the purpose of preventing an attachment by the petitioner, Roberts, but it was said that the real object of

thus withdrawing the fund was not to delay the creditors generally, but only Mr. Roberts, and that it was the purpose of the respondents to use the money to pay their workmen.

J. Spaulding, for the respondents. 1. The petitioners have no standing in court, because the amount due one of them has been paid into court, and the other has less than two hundred and fifty dollars due him.

2. The conveyance to the brother was for a valuable consideration, and disposed of all the property of the firm, and thus dissolved the partnership, after which they cannot be proceeded against in one petition.

3. There is no sufficient allegation that the fraud was joint, and related to the joint estate.

4. There is no sufficient evidence of a fraudulent intent.

I. J. Cutter, for the petitioners.

LOWELL, J. 1. The tender after suit brought will not bar the petition unless the debt is the only one outstanding, or unless all other creditors consent, because the respondents are admitted to be insolvent, and the petitioners would have no right, knowing and relying on the insolvency, to accept payment in full without the consent of all. The court cannot be a party to such a preference. If the insolvency were shown only by the dishonor of negotiable paper, and the respondents professing to be able to pay all their debts, should pay the note which had been lying over, the case might be different.

2. I have often decided that so long as partnership debts are outstanding the petition in bankruptcy may be joint. The words of § 36, that where two or more persons who are partners in trade shall be adjudged bankrupt, &c., seem to point to an adjudication only while the partnership is still continuing, but when we examine the scope and purpose of the statute we find that a joint proceeding is equally useful and convenient to the proper winding up of partnership affairs, whether there shall have been a dissolution of the firm before the petition is filed, or only one which is operated by the proceeding itself. If the partners after a dissolution of the firm must always proceed separately, upon as many petitions as there are partners, great confusion will arise in marshalling the assets, and great and wholly needless expense in the administration of the bankruptcy. On general principles the firm continues

to exist for all purposes necessary to the final liquidation of their affairs. And by analogy to actions at law or in equity as well as from considerations of expediency, it would seem that where partnership affairs are to be wound up the partners may join or be joined in one petition. If it were not so the partners would always have it in their power to defeat one of the most important provisions of the law, that the creditors of the firm shall choose the assignee. The decisions, I know, were not entirely uniform under the law of 1841; but the Massachusetts doctrine was that there may be a joint petition so long as joint assets remain to be distributed: *McDaniel v. King*, 5 Cush. 469, and Judge Blatchford has intimated a concurrence in this view which accords with the practice under our present law and with the reason of the case: *Re Crockett & al.*, 2 Bank. Reg. 75. In my opinion a like result must follow if there are joint debts outstanding. It is for the benefit of the joint creditors, so long as any remain, that the proceedings should be joint, because they have the choice of the assignee. Whether there are any joint assets or not may often be disputed, and be the very question which an assignee is needed to try, as would be the case here if all the property had been transferred, instead of nearly all; but the fact of joint creditors whose rights are to be protected, is easy of ascertainment, and when ascertained shows a necessity for joint action. It is a mere question of joinder of parties. And I hold now, as I have held before, that so long as joint debts remain outstanding and unsettled, the proceedings, whether voluntary or involuntary, may be joint. In the present case there is no dispute that there were assets, because the credit of \$300 was an outstanding partnership credit at the date of the petition.

3. I consider that the fair construction of the petition is that the frauds therein set out as having been committed by the two defendants were done by them as partners and in respect to the joint property. This being so, it only remains to inquire whether the case is made out. The bill of sale was made at an unusual hour, and to a brother who was not engaged in paper-making, and it seems altogether probable that it was made on the part of the respondents with intent to withdraw the property from attachment. If so, it was an act of bankruptcy, although the grantee may have bought the property in good faith, and with no knowledge of the

Re George and Proctor.

title may be perfectly good as against the
 If the evidence on this point is somewhat
 second specification of fraud is fully made
 ed that the debt due the respondents was as-
 them to prevent its being attached by the garnishee
 the immediate and necessary result was to delay the
 at's creditors, and it is not possible for a court to look
 and that result and determine on doubtful evidence or any evi-
 nce that the parties intended, when the fund was illegally with-
 drawn from the ordinary reach of the law, to apply it more
 beneficially than the law itself would apply it. This is a funda-
 mental rule of the law of fraudulent conveyances.

This act comes fairly within the language of the statute, "or shall conceal or remove any of his property to avoid its being attached," because this means not only the physical removal or concealment of a chattel, but the concealment of the actual title and position of property of whatever kind: *O'Neil v. Glover*, 5 Gray, 144. It is not declared on in the petition under that clause, but as the procuring, by insolvent debtors, of their property to be taken on legal process, with intent to give a preference, and this requires me to decide whether the respondents were insolvent on the twenty-ninth of March. It must be remembered that the well-settled meaning of insolvency under this act, in the case of a trader, is an inability to pay his debts as they mature, and tried by this test the respondents were insolvent then as they are admitted to be now. This being so, the attachment would effect and must have been intended to effect a preference of the creditor with whom the scheme was made, and of the workmen too, if the intent were what it is said to have been.

Adjudication ordered.

Re J. H. GEORGE AND G. G. PROCTOR.

1869.

When objections are filed to the discharge of partners who are bankrupts, the trial may be joint, but the verdicts and decrees must be several.
 A preference is committed when a trader, knowing or suspecting that he is insolvent and must stop payment, pays or secures one creditor or a few creditors in full, thus giving him or them an intended advantage over the rest.

Re George and Proctor.

The failure to keep proper books of account will prevent the discharge of both partners, though the fault may be wholly that of one of them.

Any of the acts which are made misdemeanors by section 44 of the bankrupt law may be set up and proved in opposition to the discharge of a bankrupt, though he has never been tried criminally for the misdemeanor.

ISSUES of fact tried by jury on objections to the bankrupt's discharge.

JUDGE LOWELL charged the jury, in substance, as follows:—

The bankrupt law has two prominent features. 1. That the property of insolvent persons should be distributed proportionally among all their creditors, with the exception of a few debts of a privileged character, such as taxes, and wages to a reasonable amount. 2. That a debtor who has behaved fairly by all his creditors should be forever discharged from his obligations. These bankrupts were partners in trade, and their case, therefore, passes through the bankrupt court as one case, much to the convenience of all persons interested; but when it arrives at this stage, it becomes, in reality, two cases, and you are to consider the petition of each partner for a discharge and the objections made to it, severally. Each bankrupt must stand or fall by his own acts; those of his co-partner, committed without his knowledge, will not affect him, excepting that a neglect to do what the law positively requires, such as keeping proper books, will affect both, though it should actually be the neglect of one only.

These bankrupts, having submitted themselves to examination, and having complied with all the forms of the law, apply now for their discharge. Any creditor who has a provable debt is entitled to oppose the application, and is bound to specify the grounds of his opposition. When these creditors, representing, as it appears, a considerable number, and in truth, necessarily representing all the creditors, have made such specific charges, issues of fact and law are thereby made, and the court has power—and I usually exercise it on the seasonable request of either party—to order the questions of fact to be tried by a jury. In such a trial the creditors stand like plaintiffs in an action, and are bound to make out the specific charges, or some one of them, by the preponderance of the evidence, a burden which is perhaps sufficiently compensated by the right to open and close the case. For convenience I shall

Re George and Proctor.

call these creditors plaintiffs and the bankrupts defendants. You will therefore consider these specifications in their separate application to each defendant, and, by the consent of the parties, you will also make separate findings on the several specifications.

The charges numbered one and two—the third having been waived—relate to preferences said to have been given by the defendants to a pre-existing creditor. These charges do not, perhaps, contain any imputation of moral turpitude. It has been the usage in many well-ordered mercantile communities for persons in failing circumstances to pay such of their creditors in full as they chose to pay, and neither the common law nor any statute or rule in equity has forbidden it. In this commonwealth such conduct has been illegal ever since our insolvent law was passed in 1838; and it has come to be a part of our mercantile morality that such advantages should not be given to favored creditors; but the practice has been different in many other parts of the country. A preference is now made a statute fraud throughout the United States, and a fraudulent preference is a bar to the discharge of a debtor. A debtor gives a preference when, knowing, believing, or suspecting that he cannot pay all his creditors in full, he chooses to pay or secure one, and thus to give him an intended advantage over the rest. The first inquiry, then, is, whether the payments here alleged were made; if so, whether the defendants were insolvent at the time; and, lastly, whether they made the payments with the intent charged. If you find the knowledge of insolvency, and an expectation or fear of stopping payment, you must infer the intent, because every sane person is presumed to intend the well-known consequences of his acts, just as you infer, if a person passes a counterfeit coin as good, knowing it to be counterfeit, that he intended to defraud the person to whom he passed it. The intent with which an act is done is not, ordinarily, a matter of direct evidence, but of inference from the act and the surrounding circumstances. If you see a person eating, you infer that he is hungry; and so throughout the whole domain of human conduct. The plaintiffs argue to you that the actual insolvency of the defendants, at the dates of the payments charged, is clearly shown by their books of account. They say that there were, at that very time, considerable debts overdue, so that the defendants had in fact stopped payment a day or two before; and

further, that the acts of the defendants, and the state of their affairs as shown by the schedule prepared by one of them two days after the last alleged preference, clearly prove not only the fact, but also their own knowledge of the state of their affairs; and you will recollect what was urged on the other side. One remark only is necessary on this point. It has been zealously insisted, on the one side, that the payments were made out of the usual course of business; that one of the debts was not due, and that the others were not called for,—being loans on call. All these matters of fact you will decide; but one argument seemed to assume that a payment in the ordinary course of business could not be a preference; and the other, that one not so made must be a preference. Neither is absolutely true as a proposition of law. The fact may be, and no doubt usually is, very important in the view of the jury; but it is only as evidence of intent. Some payments might be preferences, though made in what seemed to be the ordinary course, and others might not be, though made out of it. It is a question of intent in each case. Under a part of section 35 of the statute, relating to certain frauds other than preferences, and not relied on in this case, the fact that a conveyance was made out of the ordinary course of business of the bankrupt is declared to be *prima facie* evidence of fraud. Even under that clause it would still be a question for the jury whether the intent of the conveyance was fraudulent. In this case all the circumstances are for the consideration of the jury on the question of intent.

The next two specifications are founded on section 44 of the statute, and for the purposes of the trial I rule that if the acts and intents therein alleged are proved, the defendants cannot be discharged, although the same acts are by the law made a misdemeanor, and these defendants have never been tried criminally for the misdemeanor. The fourth specification is that the defendants, being insolvent, did, under the false color and pretence of carrying on their trade, obtain certain goods on credit, with intent to defraud their creditors by selling the goods at once for cash, in order to raise funds for making certain preferences, being the same preferences before set forth; and the fifth is, that they disposed of, otherwise than by *bond fide* transactions in the ordinary way of their trade, certain goods which they had bought on credit, &c. The goods are fully described in each case, and both frauds are

Re George and Proctor.

said to have been committed within three months before the petition in bankruptcy was filed. No objection was taken that these specifications do not allege the acts to have been done in contemplation of bankruptcy, which I am inclined to think is a necessary allegation, because congress has no criminal jurisdiction of acts or dealings between debtor and creditor, generally speaking, but only as related to some matter like bankruptcy, or a patent-right, &c., which is put under their control by the constitution. As this point was not taken, and as the defect might be readily amended, you will consider these specifications on their merits. Under the fourth, it must be proved that some false statement of the kind alleged was made, either by word or act; and under the fifth, that the sales were made out of the ordinary course of the trade of the defendants, besides the other facts of preference necessary to be shown under the first and second specifications, and which are alleged in the fourth and fifth as part of the intent.

The sixth and last specification must be decided for or against both defendants alike, because the fact and not the intent, is the essential thing. The allegation is that the defendants did not keep proper books of account. This is a most important part of the law, because it is that which is intended to provide the assignee representing the creditors with the means of tracing out all the dealings of the debtors, to ascertain what has become of their property, what are the causes of their failure, and whether they have dealt fairly and equally with their creditors. However harshly the law may sometimes operate with some small traders, whose affairs seem hardly worthy of the trouble of recording them, it is a most reasonable and salutary rule in its application to merchants dealing with large sums and contracting large debts, and in a position to know and to be able to carry out the law. It is a question of fact whether the books are such as will give to a competent person examining them knowledge of the true state of the merchant's affairs. There is no positive rule of law requiring the entries to be made daily (though they ought to be at or near the time of the transactions), or the balances to be made at any fixed periods, or the books to be kept in any particular mode. The question is addressed to the good sense and knowledge of the jury, aided by such explanations as may be offered by experts or

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other competent witnesses, whether the books before them are sufficient and properly kept. You will recall the particulars in which the plaintiffs say these books are deficient, and the evidence and arguments upon these points on either side, and I need not repeat them. If the books were imperfectly or improperly kept in any of these particulars, both bankrupts must lose their discharge, because it is a condition annexed by congress to such a discharge in the case of merchants that their books shall have been properly kept, subsequently to the passage of this act, and no excuse however true, and no innocence of intention will avail to supply the deficiency.

The jury found both bankrupts guilty of charges 1, 2, and 6, and not guilty of the others. *Discharge refused.*

F. J. Lippitt, for the objecting creditors.

E. Avery & G. M. Hobbs, for the bankrupts.

CIRCUIT COURT.

UNITED STATES v. A. W. CUSHMAN.

1869. Before CLIFFORD and LOWELL, JJ.

Section 23 of the act of 13 July 1866, 14 Stats. 153, punishing a distiller who shall carry on business without payment of a special tax, is not repealed by section 5 of the act of 31 March, 1868, 15 Stats. 59, which punishes more severely every distiller who shall defraud or attempt to defraud the United States of the tax on the spirits distilled by him, although the minimum punishment under the former law is regulated by the amount of spirits unlawfully distilled.

IN this case, and two others against other defendants that were argued with it, the defendants had pleaded guilty to indictments framed under the act of 13 July, 1866, § 23, 14 Stats. 153, and now moved in arrest of judgment.

G. A. Somerby, C. L. Woodbury, & L. S. Dabney, for the several defendants. The statute relied on by the government has been repealed by section 5 of the act of 1868, 15 Stats. 59, for the punishment is increased by the later statute, and the offence is the same, namely, defrauding the government of the taxes on distilled spirits; for though the charge is, in form, the non-payment of the

special tax or license fee, yet, in fact, the fine is regulated by the number of gallons illicitly distilled. To the point of implied repeal, see *Norris v. Crocker*, 13 How. 429; *Com. v. McDonough*, 13 Allen, 581.

H. D. Hyde, assistant district attorney, for the United States. The offence defined in the two statutes is not the same. In the one case it is the carrying on a business without license, and in the other defrauding the government of another and different tax, which may be done by a licensed as well as an unlicensed distiller.

LOWELL, J. The mode of ascertaining the punishment established by the law of 1866, is unusual, but the offence is clearly the carrying on a business without due authority. The extent of the business carried on is made the measure of the lowest fine, but the offence is complete when the business is actually begun. Congress may have taken for granted that a person who did not pay the special tax or license fee would be very likely to be a defaulter in respect to the much more onerous tax on the product, but they have not said that it is the latter fraud which they intended to punish. Under this section it is not necessary for the government to allege, and they never do allege, that the taxes on the spirits themselves have not been paid; nor would it be a good defence to an indictment to aver and prove that in fact they had been paid.

In this district it has been our practice to require that the indictment should aver, and the jury should find, the number of gallons distilled by the defendant; but our reason for adopting this practice was not that the fact formed any part of the substance of the offence, but because it is proper, and according to the best precedents, for the jury to pass upon a fact upon which the minimum of fine is made by law to depend. Without such a finding, the record would never show whether the court had obeyed the law or not. Upon careful consideration, we are not able to see that the section under review means any thing more than this, that the amount of business done without authority shall regulate the punishment. It follows that the law of 1868, in affixing a higher penalty for a failure to pay the tax on the spirits, was dealing with a different subject-matter, and that a conviction or acquittal under either law would be no defence to an indictment under the other, and that

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the latter does not repeal the former. The real difficulty and possible hardship arise out of the statute of 1866 taken by itself quite as much as from any conflict between the two statutes.

Motions denied.

URIEL CROCKER v. J. S. BEAL & AL.

DECEMBER, 1869.

If there be a covenant to three persons jointly, and a breach, and two die, the survivor may sue alone.

By indenture between husband and wife and trustees for the latter, the husband covenanted with the trustees not to demand any property that might thereafter come to the wife by descent or devise, but that she might enjoy and dispose of the same as if unmarried. He afterwards received a considerable sum which came to his wife by descent from a brother. By his will made after he had received this money he made a trust fund for the benefit of his children, during their lives, and gave the trustees of that fund power, in their discretion, to pay his wife out of the income of the fund enough to make her yearly income up to \$3000 if it should at any time fall short of that amount, and added that he had included in the trust fund any amount of money that in equity or honor might be due his wife or children by heirship from the brother, and that he intended it to be in full and in lieu of dower. Whether this provision was intended as a satisfaction of the debt due for breach of the covenant, *quære*?

If so intended, the fact that the wife, soon after the husband's death, had accepted one small instalment of income, she having refused several others afterwards, and having brought this suit, is not a conclusive election to accept the provision of the will.

THIS was an action of covenant broken, brought by the plaintiff as the last survivor of three trustees, appointed under an indenture made between William J. Walker, of the first part, and the said three trustees, and Mrs. Eliza Walker, wife of said William J. Walker, of the second part, dated February 24, 1846, against the defendants as executors of the will of said William.

The parties by stipulation, under the statute, submitted the case to the court, without a jury; and further agreed that the record of a suit in equity between said Eliza Walker and these defendants, lately decided in this court, should be evidence in this cause. In addition to this record some oral testimony was produced.

It appeared that by the indenture Dr. Walker and his wife were to live apart, and the former conveyed to the three trustees certain

houses and other estate for the benefit of his wife, and covenanted with the trustees, their successors and respective heirs, executors, and administrators, that he would not claim or demand any property that might thereafter come to Mrs. Walker by devise or descent, but that she might enjoy and dispose thereof as if she were unmarried; and that she might receive and dispose of, as she might think proper, all personal property so acquired by her thereafter, &c. There was evidence tending to show that Dr. Walker did in his lifetime, and after the date of the indenture, receive the several sums mentioned in the declaration and in the amendment thereto, from the administrator of the estate of his wife's brother, amounting in all to \$5934.69. The defendants objected, first, that the action could not be maintained by the plaintiff; and, secondly, that the cause of action had been released by Mrs. Walker.

LOWELL, J. Upon the first point the ground taken is, that the surviving trustee cannot sue alone. But the law is that upon a joint covenant the survivor alone can sue: 1 Chitty, Pleading, 11; *Anderson v. Martindale*, 1 East, 497; 2 Walford on Parties, 1527. It is said, and truly, that the indenture provides for filling vacancies, and for keeping the number of trustees always at three; but whether new trustees could sue for an old breach of covenant, we need not inquire, because none have been appointed, and the defendants have no concern with that matter, at least in this court. If any person interested chooses to apply to the probate court, no doubt the vacancies may be supplied, but in the mean time the plaintiff has this cause of action vested in him by survivorship.

The other defence is that Mrs. Eliza Walker, on whose behalf and for whose sole benefit this covenant was made, has taken an interest under her husband's will, inconsistent with the assertion of the right sought to be vindicated in this action. This is pleaded as an accord and satisfaction and as a release. Granting that these defendants can set up this defence, which the case cited of *Bonaffé v. Woodberry*, 12 Pick. 456, seems to show that they may, and that it is properly pleaded, which it seems to be, yet I am of opinion that the facts do not support it as a bar to this action.

It is undoubtedly true that where provision is made in a will for the benefit of any one, he cannot both accept that benefit and re-

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pudiate the will in any part. Thus a widow who has an estate left to her in lieu of dower, cannot after voluntarily accepting the provision demand to be endowed; and there are many like cases. And the rule prevails in this country at law as well as in equity. In equity the party is put to an election; and even at law, this can sometimes be done, as where a paid legatee disputing the will was required to pay the amount of his legacy into court: *Hamblett v. Hamblett*, 6 N. H. 333. But courts of law find much greater difficulty in dealing with such a case, and, as I understand, will not hold the devisee or legatee to be barred, unless it is clear that he has made an irrevocable election. See the remarks of Lord Redesdale, 2 Sch. & Lef. 450. If there is doubt on that point, the executor must be left to his remedy in equity, where full and complete justice can be done to both parties.

When the question is whether a legacy is intended as satisfaction for a debt, the same general rule prevails, but all intendment of law are against the inference of such an intent: See *Chancey's Case*, 2 Lead. Cases in Eq. [318] and notes to Am. ed.; *Strong v. Williams*, 12 Mass. 391. Very slight circumstances will avail to negative any such presumption, as for instance the mere fact that the testator has directed all his debts and legacies to be paid, or that the legacy is less beneficial in any respect, though more so in others, than the debt. In the present case, the testator leaves a fund to trustees to divide the income, and eventually, after the lapse of many lives, the principal, among his six children and their representatives, and directs that, if necessary, the trustees may in their discretion, out of the income of this fund, pay his wife enough to make her income up to \$3000 a year, if the income of the property settled by the indenture should fall short of that sum; and adds, "I having included in the sum given in the second item above [that is, the trust fund] any amount of money that in equity or honor may be due to my said wife or children by heirship from her late father or brother, Joseph Heard, deceased. And it is my design and intention that the provision herein made, coupled with the amount secured to her by said indenture, shall be in full and in lieu of her dower in my estate." He then gives the bulk of his estate to certain charities.

Here is a very clear intent expressed to bar dower; but it is by

no means so clear that he intended this provision to be a satisfaction of the amount due this plaintiff for the benefit of his wife. It is mainly a provision for his own children, of which he says that one inducement is that he may in equity and honor owe them and their mother something for what he received from the estate of this brother and some one else. He acknowledges no legal obligation, and does not assert that he is making any satisfaction. The provision for his wife is only contingent, and at the discretion of his trustees. Considering the great care and minuteness with which such matters are provided for in the will, I find it difficult to understand this ambiguous declaration as meaning that his wife, if she takes any income in any year shall not be paid this debt. Suppose she does not take it, the trust fund remains the same, only her children get a somewhat larger income. The defendants must read this will as meaning that, in consideration of a debt due his wife, he leaves certain property in trust for their children, out of which the wife may, in certain contingencies and on some occasions, at the discretion of his trustees, have an income. What is there for her to elect? She cannot elect that the trust-fund shall not be created, nor that her children shall not have the income. If the question were between her and the children, I can understand that she might be required to choose. But suppose the children all assent to her having this income, what concern have the executors with the question?

If she is put to such an election, the evidence does not show that she has made the same so conclusively that a court of law will hold her barred. It seems that she has accepted one instalment of income and has refused all others. If there be any inconsistency, then the suffering this action to be brought may be an election, and the trustees may refuse to pay her any more income. This will work exact justice, and will require the point to be settled in equity, where this question of election can be more properly dealt with.

I find as matters of fact, (1). That the indenture referred to in the plaintiff's declaration was made as therein set forth; and that the plaintiff is the sole survivor of the three trustees named in said indenture. (2). That after the making of the indenture the defendant's testator received the sum of \$5964.39, which

Re Yeaton.

came to his wife, Eliza Walker, from the estate of her brother, Joseph Heard, who died after the date of said indenture, whereby he broke the covenants thereof. (3). That said Eliza Walker received the sum of \$145.51, on 14th July, 1866, as an addition to her income for the year 1865-6, under the third item of said testator's will; and that she has refused to receive any further sums under said item of said will.

And as matters of law: (1). That said indenture is valid; (2). That the plaintiff as the sole survivor of the three trustees named in said indenture, may well have and maintain this action, and is entitled to recover said sum of \$5964.39, with interest at six per cent per annum, from the dates of the payments respectively, and his costs; (3). That said cause of action has not been released by the act of said Eliza above mentioned.¹

Judgment for the plaintiff.

DISTRICT COURT.

Re R. F. YEATON.

FEBRUARY, 1870.

The lessor of a shop took a mortgage on the fixtures as security for the rent and the performance of the covenants of the lease. The lessee was to pay a certain rent monthly, and taxes. The lease provided that it should terminate if the lessee should be declared bankrupt, or any assignment of his property should be made for the benefit of creditors, unless within ten days from the date of the petition or assignment some sufficient person should become surety for the rent. The lessee became bankrupt November 1, 1869, an assignee was chosen November 23, and the keys were returned to the lessor January 1, 1870. *Held*, the mortgage was a valid security for the rent up to January 1.

It seems, that an assignee in bankruptcy will not become responsible for rent of a store merely by leaving some goods there mingled with other goods, which were mortgaged to the lessor.

PETITION by an assignee in bankruptcy to redeem a mortgage given by the bankrupt. The bankrupt took a lease from the

¹ The validity of the indenture had been sustained in another suit before this case was tried. See *Walker v. Walker*, 9 Wallace, 748.

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respondent of a building on Washington street, in Boston, for five years from the first of April, 1868, at a yearly rent of three thousand five hundred dollars, payable monthly, and the taxes; and simultaneously with the execution of the lease, gave the respondent a mortgage upon the fixtures and some chattels as security for the payment of the rent and the performance of the other covenants of the lease. Among other provisos of the lease was the following: "Or if the lessee shall be declared bankrupt or insolvent according to law, or if any assignment shall be made, or attempted to be made, of his property for the benefit of creditors, and some sufficient person shall not, within ten days from the date of the petition or assignment, become surety for the payment of the rent due and to become due for the premises, then, and in either of said cases, this lease shall terminate by its own limitation, and said lessee, and those claiming under him, shall be considered, to all intents and purposes, as holding possession of the premises unlawfully, so as to entitle said lessor, or those having his estate therein, to any existing or future remedies under the laws of this commonwealth for recovering summary possession thereof."

The parties agreed to the following facts: Rent was paid up to September 1, 1869. On the first day of November, 1869, the lessee petitioned to be adjudged a bankrupt; the assignee was chosen on the 23d of November, and the assignment bore date of that day. The taxes for 1869 were assessed before the bankruptcy, and were paid by the lessor, and have not been repaid; and the rent has not been paid since the first of September. On or about the first of January, 1870, the keys were given by the bankrupt to the lessor, and the latter has relet a part of the premises; but upon receiving the keys he notified the assignee in writing that he did not accept a surrender, but should hold the lessee and his estate liable for damages.

C. S. Lincoln, for the assignee.

A. A. Ranney, for the mortgagee.

LOWELL, J. There is no evidence that the assignee has done any act looking to an acceptance of the premises, excepting that a part of the bankrupt's goods not included in the mortgage remained, and still remain, in the building. This circumstance alone does

Re Yeaton.

not prove an acceptance, especially when the keys were sent back to the lessor, which was an unequivocal act of renunciation. See *Wheeler v. Bramah*, 3 Camp. 340; *Hoyt v. Stoddard*, 2 Allen, 442. It cannot be contended, therefore, that the assignee is personally bound for the rent; and the question argued now has been, to what extent and for what sum is the mortgage a valid security in the hands of the lessor? He appears to have acted upon the theory that the lessee remains liable on his covenants notwithstanding the bankruptcy. This was the law of England under the older statutes; but it may well be doubted whether by our bankrupt act, which authorizes all demands arising out of contract to be liquidated and proved, the lessor will not be bound by the certificate. I understand that this question is likely to be litigated in some other cases, and as it is not essential to pass upon it here, I merely advert to it. Under this lease and mortgage it would seem that the lessor may hold the chattels to secure the payment of all rent and taxes which were due him when the assignee had elected not to take the term. That election ought to have been made in ten days after the assignment, but was not in fact made until January 1, some weeks later. I say ten days from the assignment, because that is the fair construction of the proviso, which, taken literally, might give only ten days from the petition. It must be assumed that the parties to the lease knew that a petition in bankruptcy may never be followed by an adjudication, or not within ten days, and that even after adjudication there is no one to act for the estate until the assignment, and as the purpose of the proviso is to give an election to continue the lease, and not to forfeit it by relation to a past time, the more liberal construction should be adopted. But even if the lessor might have treated the estate as ended on the 11th of November, he could waive his extreme rights for the benefit of the assignee.

Neither party having acted or made known his election until the first of January, the lessor ought to have his rent up to that day, for he may have expected the assignee to take the lease, as he undoubtedly would have done if he had found a purchaser, or in any way could have made it profitable for the creditors.

Assignee to redeem by paying the rent to January 1, 1870, and the taxes for 1869.

Re Rogers.

Re W. M. ROGERS.

FEBRUARY, 1870.

The bankrupt act does not refuse to discharge a debtor merely because he has misused and wasted his estate.

Nor because he has made fraudulent purchases.

A clerk who had, within a few months before his bankruptcy, bought a carriage, a harness, a sleigh, two pairs of horses, and some cigars, and had sold them again, but who had shown no intention to trade generally, and had not bought for the purpose of selling again: *held*, not a tradesman within § 29, and not bound to keep books of account.

LOWELL, J. The evidence relied on in support of the objections to the bankrupt's discharge is found in his examination in the cause, and this shows a reckless waste and extravagance in expenditure, and a disregard of the just rights of creditors. The bankrupt appears to be a salesman or drummer for a manufacturer, with a fair salary, and within six or seven months of the date of his petition he had run in debt for horses and carriages, and borrowed money to an amount which, for him, was considerable. He kept no books, and is not able to give any details of his expenses, though he says, in general terms, that he used all the money in living and in paying other debts. The first specification of the objecting creditor is that the bankrupt caused and permitted the loss, waste, and destruction of his estate and effects, and misspent and misused the same, setting out the items. And it requires no forced construction of the evidence to find this charge to be sustained. But there is no such objection to a discharge to be found in the bankrupt act, unless the loss, &c., occurred after the filing of the petition. Every kind of fraud is carefully prohibited, but not extravagance or waste, except gaming. The statute may be supposed to be framed upon the presumption that men will not give credit to spendthrifts. I may wish the law were otherwise, but I cannot say that under any fair interpretation of it the first specification, though sustained, is a good ground in law to prevent the bankrupt's discharge.

The second and third charges are not pressed. They are too vague to require or admit of testimony in their support, and none was given. The fourth avers that Rogers was a tradesman, and

Re Rogers.

kept no books of account. It is true that he kept no books. Was he a merchant or tradesman? He appears to have sold most of the goods and chattels for which he had contracted debts, namely, one carriage, one sleigh, two pairs of horses, one piano, one harness, and part of a lot of cigars. It is doubtful whether, in most cases, he intended to sell them at the time he bought. For example, one pair of the horses ran away with him and broke the sleigh, and he sold them; he used a part of the cigars and sold a part. Giving the evidence its full effect, and drawing the most favorable inferences for the creditors, the instances of trading, such as I have mentioned, would not exceed five. And as to those, it may be said that the purpose was to sell the goods if he should find it necessary. But I do not find that he ever formed the deliberate purpose of buying to sell again in order to raise money. Such conduct might be within the mischief and possibly within the letter of the act, though a trader, generally speaking, is one who buys in order to sell for a profit. So might an amount of trading, however small, connected with an intent to deal generally: *Ex parte Magennis*, 1 Rose, 84. But this bankrupt does not appear to have considered himself a trader, or to have held himself out as such, or to have been so considered by others. If the acts he did make him a tradesman, any single act of buying and selling must have that effect; for they were isolated and separate acts, having no connection with each other, and showing no intention to set up any trade. He bought goods which he could use and did use, and when he was pressed for money, or even to put the worst construction on his conduct, when he contemplated bankruptcy, he sold them. If any sale were fraudulent, or if any preferences were given, or any property or money kept concealed, he would be fully within the act. If such things were done they have not been proved, and upon the point now before me, I must say that the evidence does not sustain the charge.

Another specification sets up a buying of goods when the debtor knew he could not pay for them; and another, a fraudulent buying of a piano. Neither of these is within the act. The frauds which prevent a discharge are nearly all such as tend to the injury of creditors generally. One who has been induced by fraudulent

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representations to sell goods to the bankrupt, finds his remedy in the right to receive a dividend and to hold the remainder of his debt undischarged by the certificate. I have held that any fraud on the act may be given in evidence, including all that are mentioned in § 44; and in that section will be found one or two possible frauds which may affect only a part of the creditors, but neither of them is set up in this case.

I am constrained to say, that, in my opinion, the discharge must be granted upon payment by the bankrupt of the fees mentioned in the eighth specification, which are not disputed, and which the assignee has no funds to meet.

F. W. Kittredge, for the creditors.

A. W. Boardman, for the bankrupt.

THE AMERICAN EAGLE. — THE FOREST CITY.

FEBRUARY, 1870.

The supervising inspectors of steamboats have power, by law, to make regulations not inconsistent with the general laws of navigation, for steamers passing each other.

Rule one adopted by the inspectors, so far as it purports to authorize pilots to disregard the general law concerning vessels meeting end on, is void.

A pilot who obeys the inspectors' rule, does so at his own risk, if it turns out that he has disobeyed the law.

If a vessel is sailing at night without lights she is *prima facie* in fault.

So if she has no lookout forward.

COLLISION. — The libel first in date was brought by the owners of the steamer Forest City, a large coasting vessel which plies between Portland and Boston, against the steam-tug American Eagle, for a collision in the harbor of Boston, at a quarter before six o'clock on Christmas morning, 1869. In the other case the parties were reversed.

The steamer was coming up the main channel towards East Boston, heading northwest, intending to sweep round near the Grand Junction wharves and proceed to her dock at India wharf. This is the usual course for large steamers when the tide is ebb.

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The tug was coming down from East Boston towards Dorchester, heading southeast, and was lashed to the port side of a schooner loaded with coal. Neither the schooner nor the tug had any lights, because the master of the tug, who had the entire control of the navigation of both vessels, thought they would be of no use in so light a night. The officers of the steamer saw the tug and schooner, but swore that they could not make out that they were in motion, and after they found out that fact, were uncertain in which direction they were moving. When they saw that the vessels were approaching each other, the steamer's men sounded their steam-whistle once, which is the signal to go to the right; and they all swore that they distinctly heard one whistle and only one from the tug; the steamer's helm was put to port, but they soon after discovered that the tug had starboarded, and was swinging in the same direction with themselves. They then stopped and reversed their engine, but the vessels came together, and the bow of the schooner struck the port side of the steamer about thirty feet from her stern. The place of meeting was a few hundred feet ahead of the school-ship. On the part of the tug, the evidence was equally clear and positive that she sounded her whistle twice, as a signal to go to the left, and heard no reply from the steamer, but discovered the mistake and stopped and reversed.

H. W. Paine & R. D. Smith, for the Forest City.

G. O. Shattuck, for the tug.

LOWELL, J. By twenty-ninth section of the act of 30 August, 1852, 10 Stat. 72, and the ninth section of the act of 1866, as amended by that of 1867, 14 Stats. 228, 411, the supervising inspectors of steamboats are empowered to make rules, not inconsistent with the navigation laws of the United States, for the government of certain domestic steam vessels in passing each other; and rules have been made and revised from time to time, and duly promulgated, and both parties in this case appear to have had these rules in mind and to have intended to follow them. Of the latest revision, that of January, 1869, the first rule is that where steamers are approaching each other head and head, or nearly so, it shall be the duty of each to pass to the right, and the pilot of either steamer may be the first to determine to pursue this course, and thereupon shall give one short and distinct blast of

his steam-whistle, which the other pilot shall promptly answer. So far the rule is in accordance with the act of congress for preventing collisions, and seems well calculated to aid in its observance. It then proceeds: "But if the course of such steamers is so far on the starboard of each other as not to be considered by the pilots as meeting head and head, or nearly so, or if the vessels are approaching each other in such a manner that passing to the right, as above directed, is deemed unsafe by the pilot of either vessel, the pilot so first deciding shall immediately give two short and distinct blasts of his steam-whistle, which the pilot of the other steamer shall answer promptly by two similar blasts of his steam-whistle, and they shall then pass to the left, or on the starboard side of each other."

The attempt by the tug to carry out the second part of this rule was a prominent cause of the collision. It so happened that her pilot, instead of being the first to decide to go to the left, actually made the decision at the same moment that the steamer's pilot determined to follow the general rule, and so they both turned in the same direction and came together. It is argued very forcibly that here was an attempt by both parties, acting in good faith, and with equal diligence, to observe the same regulation, and that it cannot be imputed to either as a fault that the regulation failed to meet the case; but that the accident, humanly speaking, was inevitable. On the other side, it is urged that the rule itself is void, because the act of congress positively requires both vessels to go to the right. If the rule is to be construed to mean that when steam vessels are actually meeting end on, or nearly so, either pilot may decide to disobey the statute, and may thereupon compel the other to do so, it is null. But if it be intended, as the argument for the tug insists, only for those cases in which the vessels are not in fact meeting at all, but in a situation in which they would pass clear to the starboard of each other, and gives to the pilot who first discovers this to be so the power to notify the other not to go to the right, but to keep on or a little to the left, it may be a useful and proper regulation. But suppose the steamers are meeting, and do meet, notwithstanding that the two whistles are heard and acted on, it seems impossible to maintain that the pilot who notified and required a

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departure from the usual course did not do so at his own risk. The serious objection to the rule is, that it gives the decision to one vessel exclusively upon a point on which the law casts it upon both. Of course, there will remain the case in which the pilot who decides to go to the left finds some obstacle or danger in the other course, which is unknown to the pilot who is meeting him. This exceptional case excepted, it seems to me that he who deviates from the law must assume the responsibility. By making the decision he guarantees its propriety, that is, that the vessels are not meeting. The tug did not even obey the rules of the inspectors, of which the third is, that if the pilot of either vessel fails to understand the course or intentions of the other, whether from the signals being erroneously answered or from other causes, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam-whistle, and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed, &c. The master of the tug did not give these short and sharp blasts, and the obligation rested upon him to do so, because he knew that his signal had not been answered, while the steamer's pilot had good reason to believe and did believe that his signal had been answered, and so was off his guard. He says there was no time; but the evidence on both sides seems to show that the vessels were more than half a mile apart when the signals were given.

The tug and tow had not the lights required by law. The witnesses on both sides say that the night was bright and clear, and that a vessel could be seen two or three miles off. But those of the steamer swear positively that they were for some time in doubt whether the schooner and tug were under way, and in what direction. If this is true, and I see no reason to doubt it, the want of lights contributed to the collision, because the steamer's whistle was sounded as soon as her pilot found that the other vessel was coming towards him, and it would probably have been sounded earlier had this fact been made out earlier. I cannot exonerate the party who has failed in a statute obligation, unless it is plain that the fault has had no effect on the disaster. Then, again, there is no evidence of a lookout on the forward part of the schooner. If there had been the tug might have whistled earlier. There

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appears to have been a series of unfortunate coincidences by which each vessel discovered the direction of the other at the same moment, and that, possibly, a somewhat late one. But one had the lights and the lookout, and the other had neither. I consider, therefore, that the latter must be held to be in fault, independently of any question of the course pursued after the danger was discovered.

I do not choose to rest my decision upon the narrow ground that the tug did not, in fact, whistle first; because her pilot had no reason to know that; but I feel bound to hold that his want of lights and of lookout may probably have contributed to the accident by retarding the action of both parties; and if not, and the whistles were sounded in good season, then he disobeyed rule three, and neglected to give instant notice that something was wrong, a fact which the other pilot had not the same reason to suspect. Either way the tug is responsible. And I may add that if the time was so very short as not to admit of a correction of signals, I doubt very much whether the pilot could be justified in going to the left under rules which evidently contemplate a much earlier action.

Decree for the steamer.

H. W. Paine & R. D. Smith, for the *Forest City*.

G. O. Shattuck, for the *American Eagle*.

C. H. WHITEHOUSE, Petitioner for *Habeas Corpus*.

MARCH, 1870.

A bankrupt arrested on an execution issued on a judgment in an action for deceit is not entitled to be relieved on *habeas corpus*, for the arrest is in an action founded on fraud.

LOWELL, J. During the pendency of his proceedings in bankruptcy (to quote the language of section 26 of the statute), the bankrupt was arrested on an execution issued from the superior court and petitions for a writ of *habeas corpus*. The record of that court, if admissible, shows that the judgment was based upon a verdict rendered in an action for deceit, and was rendered before

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the bankruptcy. The question submitted is, whether the arrest is within the exception of section 26, as being in an action founded upon a debt or claim from which the bankrupt's discharge, if obtained, will not release him. By the consent of the parties I have consulted with Judge Shepley upon this point, and we think that the petitioner is not entitled to be discharged from arrest. The civil action in which he is arrested is distinctly and solely founded on fraud, and so is within the equity of the exception of section 33. It is argued with a good deal of force that a judgment merges the original cause of action, and converts what was an unliquidated demand for damages into a debt, and that it is altogether immaterial what the nature of the original demand may have been.

We are of opinion, however, that the record of the action in which the execution issues, may be looked at, and if it shows a material and traversable allegation of fraud as its sole foundation, the debt or demand may fairly be said to be one founded in fraud, and the action to be one founded upon a debt or claim from which the bankrupt's discharge would not release him. The execution is a writ issued in the cause, and the arrest is an arrest in a civil action. I do not intend to express any opinion upon the question whether a judgment in an action of contract, in which an allegation of fraud, if made, would be immaterial, might not be such a merger or waiver as is contended for. It might be very difficult to admit evidence to vary or contradict the record in favor of the creditor, when the debtor would be concluded on his side. Nor do I even mean to say that a suit on this judgment might not remove the fraud beyond the view of the court. In the case of *Devoe*,¹ I decided that an arrest on mesne process in an action for deceit was within the exception and not to be relieved against, and I have seen no reason to change that opinion. I now decide that an arrest on execution in a similar action, comes within the same rule.

Writ refused.

R. I. Burbank & R. Lund, for the petitioner.

W. H. Towne, for the creditor.

¹ *Supra*, 251.

Ex parte Dalby. — Re Griffiths.

Ex parte DALBY. — Re GRIFFITHS.

MARCH, 1870.

The assignee in bankruptcy stands in the place of the bankrupt, and takes only the property which he had, subject to all valid claims, liens, and equities.

In the absence of actual fraud, a mortgage of chattels made by a resident of Massachusetts is good against the assignee in bankruptcy, though it had not been duly recorded at the date of the bankruptcy.

If a mortgage on the bankrupt's property is held as security for several notes and indorsements given by the mortgagee for the accommodation of the bankrupt, and the security is insufficient, the several holders of the paper are to have a *pro rata* share of the proceeds of the mortgaged property; and may prove against the estate for the balance of their respective debts after crediting their shares of the security.

BANKRUPTCY. — In July, 1867, Griffiths lived and had his principal place of business in Boston, and had a factory in the adjoining city of Roxbury, which has since been annexed to Boston. In that month he gave the petitioner Dalby a mortgage upon the fixtures and tools in his factory, which recited that Dalby had indorsed notes for him on a promise of security; and the condition was, that Griffiths, his executors, administrators, and assigns shall, at or before the expiration of nine months from the date of the mortgage, pay certain promissory notes, and save Dalby harmless from the payment of the same or any part thereof, "said certain notes being described as follows, to wit;" one note is then described, and the condition proceeds, "and any and all other notes given or indorsed by said Dalby for the accommodation of the said Charles W. Griffiths & Co. during the pendency of this deed," then, &c.

The mortgage was recorded in Roxbury, whereas by law it should have been recorded in Boston, and no possession was taken under it. The note described in the deed, and all other notes given or indorsed within nine months after the date of the deed, were paid; but the parties continued in the same course of dealing, and there were outstanding at the time of the bankruptcy of Griffiths in January, 1869, notes of the like description to a greater amount than the value of the mortgaged chattels. The property was sold by the assignees, by consent, and the mortgagee petitioned for the proceeds.

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T. H. Sweetser & T. F. Nutter, for the assignees.

G. A. Somerby & T. S. Dame, for the mortgagee.

LOWELL, J. The deed is obscure. What the "pendency of the deed" is, may well be a question. It can hardly mean the nine months, because that is merely the time limited for payment of certain notes which purport to be described; and though only one is in fact described, the facts show that there were others then existing, to which the security was certainly intended to apply. After the nine months the deed would still be pending if there were a breach. The most favorable construction that I can give for the assignees is this, that so long as the mortgage remained a valid and existing lien upon the property, it should secure all notes of the kind mentioned in it. Now, there was no time up to the date of the bankruptcy when notes were not outstanding; no time when the mortgagor could have called upon the mortgagee to cancel his security on the ground that he was no longer liable as indorser for accommodation of the mortgagor; the course of dealing was continuous, and the proceeds of new notes were used, in part, to take up the old notes. But I am much inclined to think that the true reading of this deed is, that it should secure all notes of the kind mentioned until it should be given up, or in some way cancelled or abrogated. In either view, it secures the notes mentioned in the agreed statement.

The important question of law remains to be considered, whether such a mortgage, not duly recorded, is good against the assignee in bankruptcy. Independently of statute, such a mortgage, given for value and in good faith, may be valid without change of possession: *Conard v. Atlantic Ins. Co.*, 1 Pet. 449; *De Wolf v. Harris*, 4 Mason, 515; *Briggs v. Parkman*, 2 Met. 263; *Notes to Twyne's case*, 1 Smith's Leading Cases, 1. In Massachusetts, since 1832, the statute has required possession to be taken and kept by the mortgagee, or a due record of the mortgage; and if neither is done, it shall not be valid "against any other person than the parties thereto:" Gen. Stats. ch. 151, § 1. The supreme judicial court of the commonwealth have construed this language strictly, and have held that actual notice of the mortgage would not defeat the title of a purchaser: *Travis v. Bishop*, 13 Met. 304; and they had before intimated that probably an attaching creditor, with

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actual notice, would hold his attachment against the mortgage: *Denny v. Lincoln*, 13 Met. 200. From these decisions and intimations the step was easy to a ruling that an assignee in insolvency had a better title than such a mortgagee: *Bingham v. Jordan*, 1 Allen, 373. But before this last case was decided, Judge Story had held a different rule in *Winsor v. M'Clellan*, 2 Story, 492. His reasoning is that the assignee, in the absence of fraud in fact, represents the bankrupt, and takes only what he had, subject to all incumbrances and liens which are valid against him, and that he is therefore fairly one of the parties within the statute. This decision does not appear to have been brought to the notice of the court in the argument of *Bingham v. Jordan*; but the two cases are not necessarily opposed, because by the insolvent law of the State the assignee takes not only all the debtor's property, but all that could be taken on execution against him at the time of the insolvency; and under the earlier decisions and intimations, such chattels could have been taken by an execution creditor even though he had actual notice of the mortgage. There was no such language in the bankrupt act of 1841, nor is there in that of 1867.

In the important and celebrated case of *Mitford v. Mitford*, 9 Ves. 87, on which Mr. Justice Story mainly relied in the decision I have cited, it was held by Sir William Grant that a *chose in action* of the wife of a bankrupt, not reduced into possession by him or his assignees before his death, survived to the wife. "Assignees in bankruptcy," said the learned Master of the Rolls, "take subject to whatever equity the bankrupt was liable to. They are not considered purchasers for valuable consideration in the proper sense of the words." He then cites Lord Hardwicke and Lord Thurlow as saying that an assignment by operation of law does nothing more than to place the assignee in the room of the husband. Mr. Christian, in his work on Bankruptcy (2d ed.), vol. i. p. 490, criticises this opinion with some sharpness, and thinks the rule cannot be considered established until determined at law. It has since been so determined, in accordance with Sir W. Grant's decision: *Sherrington v. Yates*, 12 M. & W. 855.

The doctrine that an assignee in bankruptcy takes only the title of his assignor is now generally recognized. Thus it has been held in Massachusetts, that goods put into the hands of a trader

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for the very purpose of giving him a false credit will not pass to his assignee in insolvency: *Audenried v. Betteley*, 5 Allen, 382. And see *Butler v. Breck*, 7 Met. 164; *Stetson v. Gulliver*, 2 Cush. 494; *Clarke v. Minot*, 4 Met. 346. In the absence, therefore, of fraud in fact, of which the want of record may often be strong evidence, but which the agreement of facts in this case disclaims, a mortgage which is good against the bankrupt is good against his assignee. The rule would be different in those States in which the continued possession of the mortgagor is held conclusive of fraud. This is all the uniformity which the bankrupt act can have in its operation on titles created by the diverse laws of the States.

The decision of Mr. Justice Story ought to be followed here, even if I were not agreed with him in opinion, because the bankrupt act of 1867 does not differ specifically in the granting part from that of 1841. By the fourteenth section, it gives to the assignee all the property and estate of the bankrupt, with certain exceptions, and authorizes him to redeem or discharge any mortgage, pledge, or lien, &c. Much stress was laid upon the fact that in the same section it is provided, that no mortgage of any vessel, or of any other goods or chattels, made as security for any debt or debts, in good faith and for present considerations, and otherwise valid, and duly recorded pursuant to any statute of the United States or of any State, shall be invalidated or affected "hereby." But it does not seem to me that this proviso can enlarge the rights or title of the assignee, or can make a mortgage invalid against him, which but for the proviso would have been valid. Suppose possession to have been taken and retained by the mortgagee, no record would be necessary; and the mortgagee's title would be good at common law and by the statute, but the proviso, in terms, only saves mortgages that have been duly recorded, and not those which need no record. By the decision of Judge Story, this mortgage need not be recorded as against the assignee in bankruptcy, who is one of the parties thereto, in the sense of the law. The proviso appears to have been inserted out of greater caution, lest it should be supposed that valid chattel mortgages should be affected by the assignment, and not with any view of construing the State laws which concern the recording of mortgages; and so if the mortgage be one that requires no record, as if it be executed in a State having

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no statute upon the subject, or if, as in this case, record is not required between the parties, the proviso will not defeat it.

It was said at the argument that the notes indorsed by the mortgagee were more in amount than the whole proceeds, and that the mortgagee had not in fact paid them. If this is so, the order should be that the assignees distribute the proceeds of sale of the mortgaged property *pro rata* among the *bond fide* holders of the notes secured thereby, and that these holders have leave to prove for the balance only of their respective debts, after crediting the payments. And even if there be enough to pay the secured debts in full, the assignees have a right to see that the money is so applied.

Petition granted.

F. PEDRO v. H. M. ALLEN.

MARCH, 1870.

A mate was shipped for a whaling voyage of three years at a certain lay and a "bonus" of two hundred dollars, paid him at the time of shipment, and receipted for as a bonus "to perform the voyage." He served faithfully for fourteen months, and was then discharged with the master's consent upon terms satisfactory to both, one of which was that he should have his lay up to the time of his discharge. *Held*, the owners could not deduct from the mate's lay a proportionate part of the bonus as a set-off or recoupment, on the ground that he had not performed the voyage.

Costs given the libellant because the owner had refused to pay until the expiration of a credit which he had given for the oil.

LOWELL, J. The libellant served as second mate and afterwards as mate, on board the respondent's brig Pocohontas on a whaling voyage, and his lay is agreed to be \$352.07, which is his proportion, by the articles, for the time he served, unless something is to be deducted for his not having performed the whole voyage. The contract was for three years, and he was discharged at Fayal, at his own request and with the master's consent at the end of fourteen months, and instead of receiving two months' extra wages, paid the amount of such wages to the consul as part of the contract of discharge; of which no one complains. He says his agreement was to ship at the one-twentieth lay and two hundred

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dollars "bonus;" and when the shipping articles were signed, he received the two hundred dollars. The receipt which he signed calls it a bonus, and adds "to perform the voyage." He swears that he did not read the receipt, and supposed he was merely acknowledging the payment of his bonus. It is admitted that the ordinary meaning of a bonus is an advance or premium to be paid at the time of shipment; and that it is usually given to secure the services of some skilful and well known whaleman. The respondent says that in this case it was merely another mode of paying wages, and that a recoupment or deduction ought to be allowed for the part of the voyage which was not performed. Upon the evidence it seems to me that the contract was that the libellant should have a bonus, and that the understanding of course was that the voyage was to be performed. I do not know that the receipt departs from the implied contract in this respect. But this agreement was subject to death, sickness, and other contingencies, one of which was the discharge of the officer on terms satisfactory to the master. In such a case he appears to me to have performed his voyage until it ended by common consent, and that the owner of the brig has no reclamation to make. The American doctrine, and I have no doubt the true doctrine, is, that freight prepaid, as such, can be recovered back if the voyage fails; but I do not know that this rule has ever been applied to advance wages. There are, then, two objections to this recoupment. One that it was an absolute payment of which the owner took the risk, like advance wages. The other, that the settlement with the master upon terms carefully agreed on, may be presumed to have foreclosed this demand, as it was not mentioned; and as both parties appear to have understood that the libellant was to have his proportionate lay.

The question of costs depends on whether the libel was vexatiously brought without due notice, or too hastily. The letters filed in the case show that on the fifth of November, the respondent said he would settle with the libellant as soon as he could sell the oil; on the twentieth of the same month, that he had sold it on sixty days' time; on the twenty-fourth, that he should not settle until he got his money. The libel was filed on the twenty-first of December. I cannot hold it to be premature. The seamen are

The Walter W. Pharo.

not to take the risk or wait the expiration of a credit. The oil is not theirs, and they cannot control its sale. The owner may discount what is necessary for paying cash ; but if the seaman insists on payment, he must indemnify himself by such discount. I suppose that in settling the agreed facts in this case, such a deduction was made. If not, it might have been if the libel was brought before the end of the sixty days, as I suppose it was.

Decree for the libellant for \$352.07 and costs.

A. S. Cushman, for the libellant.

C. T. Bonney, for the respondent.

THE WALTER W. PHARO.

MARCH, 1870.

The owner of a yacht kept for his own use may recover, in a collision cause, as damages for the loss of her use while repairing, the price at which he could readily have let her for pleasure parties.

When each party to a collision cause had made an offer of a settlement, costs were decreed to the libellant though he recovered much less than he had demanded, which was more than he was offered.

It seems, that if a tender or offer of payment is relied on to bar costs in a collision cause, it should be set up in the pleadings, and should be a continuing offer.

LOWELL, J. The only question of law in this case is whether damages should be assessed for the loss of the use of this little yacht while she was undergoing repairs ? The general rule in such cases is that if the owner has probably lost a profitable employment for his vessel he should be paid for it. I have applied this in various ways, as where the detention was only for a certain number of days beyond what it necessarily would have been in discharging cargo, and the repairs might have been going on during the discharge, I allowed for the days beyond those needed for discharging. If a coasting vessel were repaired during the season in which she is usually laid up nothing would be due, and so on. Here the yacht was not kept for profit and was never let to hire. Still I am of opinion with the libellant that he may have compensation for the loss of her use at the market rate of such craft, because it is no concern of the respondents what use the libellant

chooses to put his vessel to. He had a right to change his mind at any moment. It is different from the case of a vessel kept for hire whom no one wishes to hire.

Damages must be assessed by market value when that is possible. The evidence tends to show that such boats would let for about eight dollars a day, and I suppose I may assume that this would be only on week days and when the weather is good. How many such days there were during the twenty days of the repairs I cannot tell. I allow eighty dollars for this damage.

The only other item that was seriously challenged is the owner's charge for services in overseeing or looking after the work. Considering the plain and simple character of the repairs, and their small cost, I should have doubted about giving any thing here, and I understood this charge to be withdrawn at the argument.

The question of costs was raised, and it seems that the libellant demanded the full amount of the bills of repairs, although he now concedes that the new mainsail and some work in the cabin are not properly chargeable to the claimants. On the other hand, the latter offered two hundred dollars, which is less than they now concede to be due. The libellant's explanation, which is not met by any evidence on the other side, is that he told the captain or the agent of the schooner that his offer was made as a compromise, that the bill contained items which he could not charge to the collision, but that it omitted others, and he thought it about what he ought to receive. In that state of the case, I cannot see that the claimants were misled or induced to defend the suit by any fault of the other party.

One word in regard to the offer of two hundred dollars. It is not our practice to insist on a formal tender when an offer is made by a person of abundant means and is rejected on its merits; but it is the practice of all courts, and is founded in justice, to insist that the defendant shall make his offer a continuing one, so that the other party may avail of it at any time. It once happened in a salvage case that I awarded less than the owners of the vessel had offered, and they then came in and asked leave to show this fact in bar of costs; but I decided that they could not lie by and take their chance of how the award would go, without pleading their offer and stating their readiness to abide by it, and then object to

Re Chadwick.

the payment of costs. I mention this because that decision has not been reported, and it seems to be thought that in admiralty any offer will always avail the parties. In this case the respondents mentioned the offer in their answer, but in the same answer denied their liability. The point is not important now because the damages exceed \$200. *Decree for libellant for the \$337.70 and costs.*

C. A. Welch, for the libellant.

J. W. Hudson, for the claimants.

Re J. H. CHADWICK.

APRIL, 1870.

Upon an application by an assessor of internal revenue for an attachment for contempt against a tax-payer, in not producing books and giving evidence concerning his liability to assessment for income, the court has power to issue an order to show cause instead of proceeding *ex parte*, and the defendant has no ground of complaint if such an order is granted.

The court has power to authorize the assessor to amend his application.

The books which the assessor has the right to examine are those of the person whose assessment is in question, and not those of third persons who have had dealings with him.

A corporation is not bound to produce its books to the assessor on an inquiry into the income of its shareholders.

PETITION FOR AN ATTACHMENT by the assessor of internal revenue for the third collection district of Massachusetts, within which the respondent resides; alleging that the respondent was a shareholder in an incorporated company, called the Boston Lead Company, of which he was likewise treasurer and agent, having charge and custody of the books of said company; that the respondent rendered his income return for 1869, and was duly assessed thereon; that the petitioner afterwards issued a summons, of which a copy was annexed to the petition, requiring the respondent to appear before the petitioner at his office and produce the books of the company, and give evidence respecting his own "liability to an income," for the years 1865, 1866, 1867, and 1868.

Upon this petition being filed in court, a rule to show cause was issued, and the respondent appeared and moved to dis-

The Walter W. Pharo.

chooses to put his vessel to. He had a *re*, apparent upon its at any moment. It is different from *re*nd, and the respon-hire whom no one wishes to hire. *re*mer objections and on

Damages must be assessed by *re* case. sible. The evidence tends to sh *re*ney, for the petitioner. about eight dollars a day, and *re* *F. Butler* with them), for the would be only on week days

many such days there wer *re* 1866, amending section 14 of that I cannot tell. I allow *re* sts. 101, and enacts that if any person

The only other it *re* to any assessor any list, statement, or re-owner's charge for *re* *re* of the assessor is false or fraudulent, or Considering the *re* statement or undervaluation, it shall be lawful their small cos *re* summon such person, his agent, or other person here, and I un *re* custody, or care of books of account containing

The quest *re* to the trade or business of such person, or any demanded *re* he may deem proper, to appear and produce such concede *re* answer interrogatories, &c. It then provides for the not p *re* of the summons, and that if any person so summoned the *re* or refuse to obey such summons, or to give testimony co *re* answer interrogatories, the assessor may apply to a judge or *re* commissioner for an attachment against such person as for a con-

re and the judge or commissioner shall hear the application, and if satisfactory proof be made, shall issue an attachment, &c. Under this section it is objected that the judge should in all cases

proceed to hear the application *ex parte*, and issue or refuse the attachment, as may appear to be just on such a hearing. But I am of opinion that I have power to pursue the course taken in this case, and issue a rule to show cause. The power to issue the attachment includes a power to notify the respondent to appear and show cause against it, whenever such a course seems most reasonable. It is and always has been the practice in chancery to make such a rule in cases which required it. It is done every day in the circuit court in patent causes, and is a practice most beneficial to the supposed contemnors. The respondent has no valid ground of objection that he is permitted to be heard on the application. If he does not care to be heard, he need not appear.

Again it is said that no amendment is within the power of the court. The argument, if I understand it, is that this is a *quasi*

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at least is of such an anomalous character and practice of amendments as applied

not penal. It provides for cases like those at occurrence in chancery and in bankruptcy. required to submit to examination before the reg-ness to testify before an examiner; and in the examination a question is asked which he is advised not answer, and he refuses to reply to it, I know of no al remedy for the examining party excepting to move for an nent. I decide a great many such motions every year; but I supposed that in doing so I was engaged in trying criminals. the only mode by which the assessor can perform a duty the law casts upon him. The tax-payer has a simple remedy, onsiders his rights are invaded, by refusing to appear, or to , as the case may be, and the assessor has no alternative omit to do his duty, as he understands it, or to apply for chment. No doubt the court has power to punish a wilful or refusal to testify in this as in all other cases, but no would ever fine or imprison a person for vindicating his ed rights, in good faith; and it would be as appropriate to motion to attach any witness an indictment, as to give that o this application. Power seems to me to be given by the stat-eofails, namely, the thirty-second section of the judiciary act), as well as by the general authority vested in the courts. come now to the merits of the case. It seems that the lent obeyed the summons of the assessor, so far as to ap-the time and place appointed therein, but that he refused uce the books of the Boston Lead Company; and the most point of contention has been whether the statute requires oduction. It seems to me entirely clear that it does not. bject-matter of inquiry by the assessor, according to the ns, and according to the fact, is the income of the respon-or one or more years, and the books of a manufacturing tion of which he happens to be a shareholder are not books ; to his trade or business, and are not alleged to be so in mons. The application is not based upon his being treas-the company, and the question does not concern the amount

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of his salary ; but the broad ground is taken that these books are the defendant's books. The statute appears to be very simple. It authorizes the assessor to examine the tax-payer's books. This is its whole scope and purpose so far as the present case is concerned. To effectuate this object, it adds agents and all other persons having care or custody or even bare possession of the books. This is the whole of the enactment. It is impossible to misunderstand it. No doubt the books of every person with whom the tax-payer deals contain some entries which relate to his business, and if every such person were summoned, it might be within the bounds of possibility to make up his income more or less accurately from a detail of all the bargains which he had made with others. But the law does not contemplate any such absurd mode of proceeding. The trade of each person is to be shown by his own books, and he or his agent, or other person having custody of them, must produce them ; but it is not the intention of the law to require A. to produce his own books in order to discover, incidentally, the trade or business of B., C., and D., who may have dealt with him.

It was strongly urged that by the statute of 1867, 14 Stats. 478, the income of every person shall include his share of the gains and profits of all companies, whether incorporated or partnership, and whether the gains are divided or otherwise, excepting of certain institutions and corporations, " whose officers, as required by law, withhold a per centum of the dividends made by such institutions, and pay the same to the officer authorized to receive the same ; " and that it may be very difficult for assessors to ascertain the undivided profits of an incorporated company (not being one of those whose officers make returns) unless he can examine their books by virtue of this section, and that this section therefore may be so construed as to effect this object, and enable the assessor to examine the books of such companies, precisely as if they were partnerships. It is not consistent with any sound canon of construction with which I am acquainted, to interpret a law passed in 1866 by reference to one passed in 1867. In 1866, the income of any person included the dividends of all companies of every kind, without exception : 13 Stats 480 ; so that the argument must reach to the production of the books of all corporations when the income of any one shareholder is the subject of inquiry,

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or it is insufficient. Now I agree that in some cases this might be very convenient; but I doubt whether this convenience would make up for the very great inconvenience which the companies and their officers must suffer by having their books liable to be called for and taken and detained whenever the income account of any shareholder is to be made up. The argument from convenience may fairly enough be said to be balanced, but not so the argument from the construction of the statute itself. There is nothing in the statute which makes corporations partnerships, or the books of a corporation the books of the individual shareholders. The law at section 14 assumes that a person's income will appear in his books, and although it may be found that by another part of the law some undivided profits not shown by his own books, are made a part of his income, yet this does not alter the law concerning his books, which are to be produced when called for, but only proves that the law may to some extent, and in some cases, fail to furnish full evidence. A person may keep no books, or may fail to make certain entries in them, or may omit, by design or accident, to collect all his dues. In such instances, the books will not fully disclose his taxable income. In the majority of cases, and in the long run, it is probable, the books will show the real state of the tax-payer's affairs; and it is to give the assessor the aid and advantage which the tax-payer himself has, and to verify his lists and statements by the record, that the statute is made.

This being so, it is unnecessary to pass upon the objections taken to the form of the assessor's summons. My impression is that the summons should state, with reasonable certainty, the cause of its being issued; as, that the assessor is dissatisfied with the returns, or the like, and the subject-matter of the inquiry. It is not like a mere *subpœna* to an ordinary witness to appear and give evidence in court, because that writ refers to the case pending in court, which enables the witness to ascertain what is required of him. The summons in such a case as this should be sufficiently explicit to enable the person summoned to decide whether he is bound to appear or not. In the present instance it may perhaps be that all defects of form were waived by the respondent's appearing and taking the oath, but the most

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important defect is one that goes to the essence of the case, and could not be cured, because it involves the very point that I have been considering. It is that the summons does not and cannot state that the books called for are the books of the respondent or of his agent, &c., containing entries concerning his trade or business within the statute.

Petition dismissed without costs.

CIRCUIT COURT.

GREAT WESTERN INSURANCE CO. v. WILLIAM THWING.

Before CLIFFORD and LOWELL, JJ. MAY TERM, 1870.

A warranty in a policy of insurance that the ship shall not load more than her registered tonnage, means that cargo shall not be carried beyond that amount. Necessary and proper dunnage is no part of the loading within this warranty, though it is carried on freight.

ASSUMPSIT to recover back money paid for a partial loss, under a policy of insurance, on the ship Alhambra, on a voyage from Liverpool to San Francisco. The policy contained a warranty that the ship should not "load more than her registered tonnage of lead, marble, coal, slate, copper, ore, salt, stone, bricks, grain, or iron, either or all, on any one passage." The ship took on board at Liverpool among other things, 1,064 tons of iron, 6 tons of brick, and 238 tons of cannel coal, making in all, 1,308 tons and her register showed 1,285 tons, making an excess of twenty-three tons. There was evidence that the coal was used for dunnage; that cannel coal is suitable for dunnage, and is often used for that purpose in cargoes shipped at Liverpool; and that so used it is liable to be crushed and otherwise injured; and received for cargo it is usually stowed differently from dunnage. And on the other hand, there was evidence that the charter-party, to furnish this coal for dunnage, and to pay for it, and that it was put in the freight bill, and a bill of lading signed, and freight paid for it. The plaintiffs, when they

loss, were not aware of any breach of the warranty, and it was agreed that they could maintain their action if the loss was not covered by the policy.

At the trial before Lowell, J., the plaintiffs asked the judge to rule that if freight was paid for this coal it came within the warranty, although used for dunnage. But the instruction given was, that if the article was in fact received as dunnage, and not as cargo, it would not be part of the loading within the meaning of the contract. The jury found for the defendant, and the plaintiffs now moved for a new trial.

M. E. Ingalls, for the plaintiffs.

S. Bartlett & D. Thaxter, for the defendant.

LOWELL, J. A warranty in a policy, like a condition in a deed, since it goes to defeat the general purpose of the contract, should be construed strictly. So construed, it seems to us, that the agreement was not to take cargo beyond the registered tonnage of the ship. It is argued that the purpose was to prevent the overloading of the vessel, and this is undoubtedly true; but the contract itself does not provide that no more than a certain weight shall be put on board the vessel, but only that the "loading" shall not exceed so much.

It is said that to load means to put or take on board for the purpose of carrying, and that the dunnage is and must be carried as far as the cargo is carried, and is, in fact, rather an incident to the cargo, than any part of the tackle, apparel, or furniture of the ship. We are not prepared to say that dunnage is not a part of the fittings of the ship to enable her to carry her cargo safely and properly. But if not, it does not follow that it is part of the cargo. The subject-matter of this insurance is a ship expected to carry cargo; the stipulation has reference to cargo and enumerates articles which may probably be shipped as such; and it seems to us, construing this warranty strictly, though without any violence to the language, that it fairly means "if the cargo shall be iron, coal, grain, &c., either or all, she shall not take as such cargo more than the registered tonnage." Suppose there were no enumeration, but that the stipulation merely said, warranted not to load more than her registered tonnage, ought the usual and necessary dunnage, say of plank, wood, rattan, or mats, to be counted, though they might amount to a very considerable weight? Could

passengers' luggage be within the warranty in such a case? Or take the case of a freighting steamer; the coal necessary for the use of her engines would not be estimated in ascertaining whether she had loaded iron, coal, stone, &c., beyond the agreed amount; and this because the warranty relates to a different subject, the cargo, and supposes the vessel to be duly fitted and prepared to receive her agreed cargo, before it begins to operate. It may be said that in such a case the coal-bunkers are no part of the registered capacity of the vessel; but I apprehend that the decision could not turn on the fact that the coal was or was not carried in the bunkers, or that more was carried than the bunkers would hold. If it was mixed up with the cargo, the result would be the same. So here, if iron, &c., were carried on deck or in the cabin, but carried as cargo, and not as stores or dunnage, the warranty would be broken.

If this be so, and if, as the jury have found, this cannon coal was in truth used for dunnage, it does not seem material that freight was paid for it. The evidence shows that it was the subject of a special agreement, and was stowed in a way that cargo ought not to be stowed.

The fact that the article has a market value does not change its character and bring it within the language, when, if furnished by the ship, and of no great value, it would not be included. Perhaps nearly all dunnage has some value. The strongest mode of stating the argument for the plaintiff on this point is, that here, in fact, was a cargo that needed no dunnage, because a part of it would serve the purpose. But the facts seem rather to show that here was dunnage of intrinsic value, besides the cargo which the charterer had agreed to furnish; and which, without a special agreement, he could not furnish, because it would be the right of the master to supply such dunnage as might be proper, at his own risk. When that had been supplied, by whomsoever it might be supplied, the ship was ready to receive her cargo. It occupied a space, and was put on board under a responsibility different from that of the loading, properly so called. This is rather a question of fact than of law, and the jury have found, in effect, that this coal was used in good faith, and properly, as dunnage; and we are not ready to set aside the verdict on this point. *Motion denied.*

A writ of error in this case is now (January, 1872), pending at Washington.

THE MERCHANTS' INSURANCE COMPANY v. W. H. MCCARTNEY,
Collector.

MAY TERM, 1870.

An insurance company being a stockholder in a bank received a dividend from the bank, three-tenths of which was made out of profits accumulated before the passage of the first act for collecting internal revenue, and seven-tenths from profits acquired afterwards. The bank more than five years before this case was tried had paid the revenue tax on the seven-tenths and denied a liability to taxation for the three-tenths, and it had never been enforced. *Held,*

1. The three-tenths was capital and not liable to assessment as income under the act of 30th June, 1864, §§ 116, &c., 13 Stats. 281.
2. The seven-tenths having been once assessed to the bank could not be again assessed to the insurance company.

THE plaintiffs owned stock in the Suffolk bank, and as such stockholders received \$115,200 as their share of an extra dividend declared by the bank January 3, 1865; of which they carried the fifteen thousand, odd, to their surplus fund, and declared a dividend among their own stockholders of the remainder. Of the dividend declared by the bank, about three-tenths consisted of profits laid aside before the passage of the first internal revenue law, and of profits of sales of real estate bought before that time; and on the remaining seven-tenths the bank paid a tax of five per cent to the government, but denied their liability for the three-tenths, and it had never been exacted of them.

The defendant collected of the plaintiffs against their protest a tax of five per cent upon the whole sum so received by them, and the question presented by the agreed facts here was whether such tax was lawfully assessed.

LOWELL, J. The revenue act under which this assessment was made is that of 30th June, 1864, and especially §§ 116-121, 13 Stats. 281, &c.

Section 120, p. 283, levies the duty on all dividends thereafter declared due as part of the earnings, income, or gains of any insurance company; and on all undistributed sum or sums made or added during the year to their surplus or contingent funds. In other words, it assesses the net annual income or gains of such corporations, whether they choose to divide them or to add them to their funds. And it provides in § 117 that in estimating the

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annual gains, profits, or income of any person there shall be deducted the income derived from dividends on shares in banks, &c., which shall have been assessed to and the tax paid by the corporations. And in § 121 that when any dividend is made which includes any part of the surplus or contingent fund of any bank, insurance company, &c., on which a duty has been paid, the amount of duty so paid on the fund may be deducted from the duty on the dividends.

The plaintiffs contend that no part of the dividend paid them by the bank was liable to assessment in their hands, because, as to the three-tenths, it was not income, and as to the seven-tenths it had already paid the tax.

As to the three-tenths it seems to me to have been a division of capital, a return to the plaintiffs in money of a part of the property which was already in their ownership as capital stock when the first tax act was passed. If the Suffolk bank had been wholly wound up, and had returned to its stockholders the exact value of their shares in money, having made no profits since the passage of the original act, this sum of money could not be taxed as income, gains, or profits; and so of a part. If the plaintiffs on receiving the money chose to divide it among their own stockholders, still it is not a dividend out of gains and profits, nor out of the surplus funds, because the surplus funds that are taxable, are those which are or have been made out of profits, since the passage of the act. This view appears to have been acquiesced in by the government, for they have neglected for some five years to enforce the opposite construction against the bank; and if this money was capital in the hands of the bank it was still capital when it reached the stockholders. The tax is assessed on the bank for convenience, but is intended to be, in effect, a tax on the shareholders; and if the latter be not assessable for the income tax it cannot be levied on the corporation: *Railroad Company v. Jackson*, 7 Wallace, 262.

There is more difficulty in that part of the case which relates to the seven-tenths. The plaintiff corporation is bound to pay on its net "income earnings or gains," whether divided or added to its funds, and so the argument must apply equally to the sum divided and to that carried to the surplus fund, it being admitted that it

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is not needed to pay losses or expenses. So the question simply : Does such a dividend on which the tax has once been paid form part of the income of the plaintiffs in the sense of § 120? It is not exempted by the proviso of § 121, above cited, for that merely means that if a corporation has once paid the tax on its gains when turned over to the surplus fund it shall not pay again when it divides that fund.

It is equally clear that sections 116 and 117 do not refer to the incomes of corporations, because the mode of assessment, the exemptions of six hundred dollars rent of homestead, &c., and the increasing rate of tax on larger and larger incomes, are all compatible with such a reference.

The real point seems to me to be whether in estimating the income of a corporation we are to take the analogy of § 117. For instance, in relation to the three-tenths which I have held to be capital, I have in fact followed the rule of § 117, though I did not refer to that section because it seemed to me the result was the same upon any fair meaning of the word income. Now supposing the question were whether interest on government bonds, or interest accrued but not actually received, &c., is to be included in the income of a corporation, might we properly refer to §§ 116 and 117 to see what is income. After much reflection I am satisfied that we are bound to make such a reference, and to take those sections as our guide in ascertaining the meaning of income in the statute. The general intent of the legislature not to tax incomes twice is clear, and so is the injustice of such taxation; but my decision rests mainly on this: The intent of congress was to tax the income of the shareholders of the Suffolk bank by a tax levied directly upon the bank. The income of these plaintiffs has been so taxed. I am not ready to believe that it was intended that the same income should be again returned to the government for a new taxation, merely because it passed through another corporation before reaching the individual owners.

This conclusion I should reach, I think, without aid from section 17, and although that section contained no express exemption. But when I find that exemption it strengthens the argument because it shows what the law regards as taxable income. It was argued that this net dividend must be income because the statute

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of 1865, 13 Stats. 479, requires that such a dividend shall be returned as income. But the same law declares that the tax which has been paid on such a dividend shall be deducted from the tax that would otherwise be assessed on the shareholder's income. It was required to be returned because it ought to be counted in ascertaining the aggregate income, which as the law then stood, was assessable at a higher rate than five per cent if it exceeded five thousand dollars. That amendment was passed some two months after this tax was assessed, and if the argument be good that such dividends are income since that time because of the amendment, I see not why it does not hold equally good to take them out of the income account before that act was passed, or to take them out of the class of assessable income if they have been once assessed.

I do not base my judgment upon the ground that the plaintiff corporation is a mere agent or trustee for its own shareholders in receiving and paying out this dividend. I do not understand that to be so in fact or in law. But I do decide that the plaintiff corporation itself, as a shareholder in the Suffolk bank, is not bound to treat this dividend on which the income tax has been paid, as income liable to assessment again by the government, whether it found it necessary to use or chose to apply the dividend in one way or another.

Judgment for the plaintiffs for \$5760 and interest and costs.
S. Bartlett & F. W. Palfrey, for the plaintiffs.

J. C. Ropes, assistant district attorney, for the defendant.

THE SAXONVILLE MILLS v. THOMAS RUSSELL, *Collector*.

MAY, 1870.

By the act of 2 March, 1867, certain foreign wools were, upon their importation, to pay a duty of three cents per pound if their value were twelve cents or less at the last port "whence exported to the United States, excluding charges at such port." Wool of this class cost less than twelve cents per pound in Buenos Ayres, whence it was imported, and was packed in hides which were of precisely the same value as the wool; and the bales were paid for in Buenos Ayres at their gross

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weight, including the hides, which were an article of value in the market here; *held*, the appraisers ought not to include the hides in their gross estimate of cost, and then to exclude their weight in ascertaining the cost of the wool per pound.

ASSUMPSIT to recover back duties paid under protest. The case was heard on an agreed statement of facts as follows:—

The plaintiff company in this case, in April and June, 1868, imported into the port of Boston, from Buenos Ayres, two hundred and sixty-three packages of Cordova wool.

This wool was entered at the Boston custom-house during the months of April, May, and June, 1868, and all of these entries for the purposes of this case, may be treated as one and the same entry.

A copy of one of the invoices is hereto annexed, all of them being substantially the same.

This wool was in bales, formed of green hides. It was bought in the market of Buenos Ayres in the same condition as when entered here. The wool and hides were weighed together, and the plaintiff paid less than twelve cents per pound for the gross weight, and it was so stated in the invoice.

Under the tariff law in force at the date of these importations, wool of this class, if of the value of twelve cents or less per pound, was liable to a duty of three cents per pound. If of the value of more than twelve cents per pound, it was liable to a duty of six cents per pound. This wool was sent to the appraiser's office for appraisement. Previous to this, under date of April 9, 1868, the secretary of the treasury had issued a letter of instructions in regard to the appraisement of Cordova wool, of which the following is a copy: "The packing or baling Cordova wool in hide covers is not to be excluded in ascertaining the dutiable value under act of congress of March 2, 1867. On arriving into the United States, the usual allowance is made for tare, and the specific duty is assessed upon the net weight of the wool. The act of March 2, 1867, directs that the value of wools, for the purpose of determining the rate of duty to be found 'at the last port or place whence exported to the United States, excluding charges in such port.'

"It is therefore clear that the packing or baling in hide covers as above stated not having been done in such port, is not to be excluded in ascertaining the dutiable value. The net pounds of wool, divided into the aggregate cost or value thereof, including

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the baling prior to the receipt at the last port of exportation, will give the number of cents per pound, by which the rate of duty should be determined."

The appraiser at Boston, acting under this instruction, after examining the wool according to law, took the gross weight in the invoice and deducted from it the estimated weight of the hides that formed the bales, and divided the amount thus found into the gross cost stated in the invoice, which gave more than twelve cents per pound, and he thereupon reported to the collector that the wool was liable to a duty of six cents per pound. The defendant thereupon assessed upon this wool a duty of six cents per pound, amounting to ten thousand six hundred and forty-four dollars and thirty cents (\$10,644.80), which the plaintiff paid under protest, a copy of which is hereto annexed. Plaintiff appealed to the secretary of the treasury in due time, who sustained the defendant, and in due time the plaintiff brought this suit to recover the excess of duty paid, amounting to five thousand three hundred and twenty-two dollars and fifteen cents (\$5,322.15), being the difference between three and six cents per pound upon the quantity of wool in question. Previous to the letter of the secretary quoted, wool of this class and value had paid a duty of three cents per pound at this port. By the custom of trade, Cordova wool in Buenos Ayres can be, and is, bought in bulk, or in bales, as the purchaser prefers. The price per pound of the wool is the same whether bought in bulk or in bales; the hides being generally of the same value as the wool, the seller, when the wool is sold in the bales, receiving the same price per pound for his hides as for his wool; and after this wool is received here and unpacked, the hides are sold in the market to dealers. The wool in question did not of itself, without the hides, cost in Buenos Ayres the gross amount stated in invoice, and when the packings, *i. e.*, the hides forming the bales, were removed, was not of said value. If the court, upon the facts, shall hold that the wool was subject to a duty of three cents per pound, then judgment shall be entered for plaintiff for five thousand three hundred and twenty-two dollars and fifteen cents (\$5,322.15) in gold, with interest and costs; otherwise, judgment for defendant for costs.

M. E. Ingalls, for the plaintiffs. This wool is dutiable by the

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act of 2 March, 1867, 14 Stats. 559, of which the part important in this case is, "Upon wools of the third class, the value whereof at the last port or place whence exported to the United States, excluding charges in such port, shall be twelve cents or less per pound, the duty shall be three cents per pound. Upon wools of the same class, the value whereof at the last port or place, &c., shall exceed twelve cents per pound, the duty shall be six cents per pound." The last port was Buenos Ayres, and the case finds that the wool was worth less than twelve cents at that port. We can recover, —

1. Because the cost of baling is one of the charges at Buenos Ayres.

2. Because in ascertaining dutiable value, if the cost of the packages is to be included, its weight must likewise be included in dividing the weight by the price to arrive at the cost per pound. See *Harding v. Whitney*, 11 Int. Rev. Rec. 103, per Clifford, J., where the packing is included when it works against the importer; and we are entitled to the same rule when it works in our favor.

J. C. Ropes, assistant district attorney, for the defendant.

1. The cost of the hides was properly included in estimating the cost of the wool, Stat. 28 July, 1866, section 9, 14 Stats. 330, unless they are part of the charges in Buenos Ayres. The charges include only those expenses which are incurred after the purchase of the goods, and before and including the shipment. *Grinnell v. Lawrence*, 1 Blatch. 346; *Barnard v. Morton*, 1 Curtis, C. C. 404; *Warren v. Peaslee*, 2 Curtis, C. C. 231; *Gant v. Peaslee*, ib. 250. The baling, in this case, was done before the purchase, and perhaps before the wool arrived at Buenos Ayres.

2. In ascertaining value the defendant simply made the usual allowance for tare, as directed by Stat. 14 July, 1862, 12 Stats. 558.

LOWELL, J. The general rule, as established by the statutes for finding dutiable value, is to take the value in the principal markets of the country of exportation, and to add the charges incurred to get the goods on board ship. The cost of packing is sometimes one of these charges, as in *Barnard v. Morton*, 1 Curtis, C. C. 404. In other instances it forms a part of the price of the article, being itself of no value, as in *Harding v. Whitney*, 11

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Int. Rev. Rec. 103. Either way it is commonly a part of the dutiable value of the goods. This statute, however, excludes the charges at the last port, and I am much inclined to think that it is to be fairly inferred from the agreed facts that the baling is one of those charges. This point is not perfectly clear upon the evidence, and I therefore pass to the next.

Assuming that the cost of the article as bought included the cost of the hides, I am of opinion that the weight of the hides ought not to be rejected in ascertaining what the wool cost per pound. The allowance for tare in assessing specific duties, is made for the very purpose of avoiding the injustice of requiring taxes to be paid on what is of no value, and stands on the same reason as the like allowance between buyer and seller. Here there was no such allowance between the parties, because the covering was of equal value with its contents. If the weight of the covering is rejected as tare, the government loses the duty on an article of value. It is true that in this particular instance the government would gain more than it would lose; but the rule must be uniform, and I apprehend that a shrewd importer might easily work such a rule to the great injury of the revenue. There is no question here of fraud, or of putting a fictitious value on the coverings in order to lessen the nominal value of the wool. The case finds that the wool whether baled or unbaled was worth less than twelve cents a pound, and that the additional cost of the wool when baled was due to the intrinsic value of the hides, and not to the expense of putting them on.

Under these circumstances the collector ought to assess the hides for their appropriate duty as articles of merchandise, but not, at the same time, to reject them as tare. Or if the importers do not object, it is easier and of some advantage to the revenue, to follow the former practice of assessing the whole as wool.

Judgment for the plaintiffs.

The Enterprise.

DISTRICT COURT.

THE ENTERPRISE.

JULY, 1870.

A British vessel was libelled for collision, and her master, who was a part-owner, admitted the liability, and the vessel was sold. The proceeds were insufficient to pay the damage in full. The owners were solvent. *Held*, the seamen's lien on the proceeds would be postponed to that of the libellant in conformity to the rule adopted by the British courts towards our vessels in like circumstances.

COLLISION—WAGES.—The schooner *Enterprise*, owned in one of the British North American provinces, was libelled in a cause of collision by the owners of an American vessel, and the master, who was the owner of three-eighths of the schooner, appeared and admitted the liability, and the damages were agreed at eleven hundred dollars. The gross amount realized from the sale of the schooner was eight hundred dollars. The master and one seaman now applied by petition to have their wages paid them out of the fund in the registry.

LOWELL, J. By the law of the flag the master has a lien for his wages, which this court will enforce by comity: *The Havana*, 1 Sprague, 402. But by the same law the lien of the seamen of a foreign vessel is postponed to that of a libellant in a cause of damage where the owners are solvent, as in this case, and the proceeds are insufficient for the payment of both: *The Linda Flor*, Swabey, 309; *The Duna*, 13 Ir. Jur. 358; Abbott on Shipping (11th ed.), 621; *The Benares*, 7 Notes of Cases, Supp. *l.* The reasons assigned for this rule are that the seamen have other available remedies for their wages, while the injured vessel has, practically speaking, only this, and that the mariners of a wrongdoing ship may be supposed to share in the fault of the vessel. The argument is the stronger in this case because the seamen have a lien on the freight which has not been proceeded against in the collision cause, and so far as the master is concerned, being an owner, he is liable to the injured vessel to make good, to the extent of the freight, pending at the time of the disaster, the deficiency which the libellants suffer of a full *restitutio in integrum*. I be-

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lieve no admiralty court of the United States has decided the general question of the order of priority of these liens, but in the case of a British ship, sold here, it is enough to know what law the courts of Great Britain administer in similar cases to our vessels.

Petition dismissed.

C. G. Thomas, for the petitioners.

J. Lathrop, for the libellants.

GERSHOM HALL v. C. J. EASTWICK & AL.

JULY, 1870.

Under a bill of lading stipulating for demurrage after a certain time from the arrival of the vessel and notice thereof, none will be payable for any days that the vessel was detained through the fault or negligence of her master or officers.

DEMURRAGE. — In this bill of lading there was a special clause concerning demurrage, lately adopted by the owners of colliers, as follows: "And twenty-four hours after the arrival at the above-named port, and notice thereof to the consignee named, there shall be allowed for receiving said cargo at the rate of one day, Sundays excepted, for every hundred tons thereof, after which the cargo, consignee or assignee shall pay demurrage at the rate of eight cents per ton upon the full amount of the cargo as per this bill of lading for each and every day's detention beyond the days above specified until the cargo is fully discharged, which demurrage shall be a lien upon said cargo." The vessel brought 288 tons of coal consigned to the respondents, and the arrival was notified to them on Monday, September 6th, at 9 o'clock, A.M.; on Tuesday the master left the vessel in charge of the mate; on Wednesday, the eighth, at 8 o'clock, A.M., the consignees notified the mate to go to the wharf of the Boston and Albany Railroad Company to discharge the cargo, but, for some unexplained reason, he failed to do so. On Friday, the tenth, the master returned to Boston, and in the afternoon of that day took the schooner to the designated wharf and found the berths occupied, which detained him for some days longer, though precisely how long he was in getting a berth and how long in discharging he could not remember. He was

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fully discharged on the afternoon of Thursday, the sixteenth of September. He demanded demurrage for six days and a half, besides his freight. The answer admitted that freight was due, and averred that the respondents had been always ready to pay it, and that the delay was wholly caused by the libellant's fault.

P. H. Hutchinson, for the libellant.

D. Thaxter, for the respondent.

LOWELL, J. The contract gives four days from notice of arrival for discharging the cargo, and ten had elapsed before the delivery was complete. The libellant contends that this fact establishes his right to recover six days' demurrage unless bad faith on his part is proved, because the contract in this respect, as he contends, merely establishes a mode of computing freight or compensation in the nature of freight for the use of his vessel during the period of detention, whatever may have been the cause of the delay. His voyage was completed, he says, at the expiration of twenty-four hours after notice of his arrival in the port, and the lay-days ended three days thereafter. It seems to me to be the fair construction of this contract as applied to the coal trade of this port, that the twenty-four hours is intended for the reasonable time in which the consignee is to notify the master where to go to discharge and for the master to get to that place, and that if the vessel fails without good excuse to obey the order to go to the wharf, the lay-days will not begin to run until her arrival at the wharf. The notice of arrival implies a readiness to deliver the cargo, and if the vessel is not in a situation to do this, the days of her unreadiness cannot be counted in her favor. On this ground three days must be added to the four which the bill of lading allows for discharging.

The respondent goes further, and contends that I must assume, in the absence of evidence to the contrary, that if the vessel had been moved on the first order, the berths would have been free, and no delay at all would have occurred. I think it is dangerous to undertake to conjecture what might have happened in a state of circumstances different from what actually occurred. The bill of lading evidently intends to throw a loss of time which may arise from a want of berths on the consignee, and not on the vessel, and there was such a loss here. The vessel was at the prescribed

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wharf and ready to unload on Friday afternoon, and her cargo was all out on the following Thursday. It is impossible to say whether this delay would have occurred if the libellant had moved his schooner on Wednesday, and equally impossible to say what would have happened if the wharf had been designated within twenty-four hours after arrival as the bill of lading contemplates. The true rule appears to be to compute the days for unloading, without including those during which the schooner was lying useless by the fault of her own people; or, which in this case amounts to the same thing, to begin to count the lay-days from the arrival of the schooner at the wharf.

This computation gives two days' demurrage besides the freight.

Decree for freight, \$648; demurrage, \$46.08; interest at six per cent from 16th September, 1869, \$34.36; total \$728.44; and costs.

M. G. MINON v. W. T. VAN NOSTRAND & AL.

JULY, 1870.

A debtor arrested on execution before filing his petition in bankruptcy cannot be relieved from the arrest by this court.

Charges of fraud filed against a defendant who is seeking the benefit of the poor debtor law of Massachusetts, though filed after the bankruptcy of the debtor, do not make a new suit or proceeding so as to enable this court to interfere and discharge the debtor.

BILL IN EQUITY. — The facts of this case as alleged in the bill and admitted in the answer, were these: In October, 1869, the respondents recovered judgment and execution against the plaintiff in the superior court for the county of Suffolk. The plaintiff was arrested on the execution in November, and gave a recognizance before Mr. Coolidge, a magistrate duly authorized to act in the premises, to appear within thirty days thereafter for his examination under the laws of the commonwealth for the relief of poor debtors. He did so appear, and the examination was begun, and was afterwards continued from time to time, and was not concluded at the time of the hearing in this case. On the fourteenth day of February, 1870, the plaintiff was duly adjudged a bankrupt,

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and an assignee of his estate has been chosen and qualified. On the twenty-fifth day of March, the plaintiff again appeared before Mr. Coolidge, according to the tenor of his recognizance, and after proving to the satisfaction of the magistrate the fact of his bankruptcy, and the proceedings therein, prayed that all further action under the execution be stayed until the question of his discharge should be determined in this court; and this being denied, prayed to be discharged from his arrest, which was likewise denied. The present respondents afterwards on the same day filed with said Coolidge charges of fraud against the plaintiff under the statute of the commonwealth, when the above-mentioned prayers were renewed and again denied; and the case has been continued to the present time. The bill prayed for an injunction restraining the respondents from proceeding further under the execution and recognizance, and that the plaintiff be suffered to go thereof without day and without further molestation, and for general relief.

C. R. Train, for the plaintiff.

R. Lund, for the defendants.

LOWELL, J. I have already more than once decided that a debtor who is under arrest at the time his petition in bankruptcy is filed, cannot be relieved on *habeas corpus*. I came to this conclusion with reluctance; but it seemed to be the necessary construction of section 26, and the rule 27 of the supreme court, founded upon it, that the benefit of the writ was only for bankrupts arrested after they became such, — and I have not changed that opinion. However I may regret the fact, a bankrupt seems to be left under such circumstances, to the operation of the laws of the State. Now the law of Massachusetts is very peculiar. It professes to abolish imprisonment for debt, but really does so only in case the defendant shows his poverty, and besides, comes within its definition of a fair and honest debtor. In respect to poverty and even to property concealed or conveyed on a secret trust for the debtor's benefit, it would seem that all such inquiries have, after bankruptcy, devolved upon the assignee, who is bound to prosecute them for the general benefit of creditors, including the judgment creditor, and that all examination which is for the advantage of the latter only ought to be dispensed with. This was

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always my view of the operation of the insolvent law of Massachusetts, but I have no power to require the State magistrate to adopt it, and to admit the debtor to the benefit of the oath. This want of power is admitted, but the plaintiff's contention is, that the specific charges of fraud which the statute of the State authorizes the judgment creditor to make, and which if duly alleged and proved, not only prevent the release of the debtor, but may subject him to punishment, are a new suit or proceeding against him which should be stayed to await the result of the proceedings in bankruptcy. By the law of the State charges of fraud, some of which may concern only the relations of the two parties to the suit, may be made by the creditor, in writing, pending the examination before the magistrate, and thereupon the defendant is to plead to them, and the case proceeds before the magistrate like a suit at law, with a right of appeal and of an ultimate jury trial. If final judgment is against the defendant he *may* be sentenced to the house of correction for one year, or to jail for six months, and *shall* lose all benefit of the law for the relief of poor debtors. This anomalous law has been decided to be constitutional and to be of a mixed character, mainly civil, but partly criminal. Gen. Stats. ch. 124, §§ 10, 31 to 34; *Chamberlain v. Hooge*, 1 Gray, 172; *Parker v. Page*, 4 Gray, 533; *Stockwell v. Silloway*, 100 Mass. 298. No public prosecution is provided for, and it seems to result from the whole tenor of the act that the defendant may end the case at any time before sentence by paying the debt and costs. Indeed his recognizance in case of appeal is to surrender himself within thirty days after final judgment, *or* pay the debt. The whole proceeding therefore appears to be framed with the view of giving the creditor an extraordinary hold upon a debtor whom he supposes to be fraudulent, but with whose conduct public justice has no particular concern.

I do not mean to be understood as throwing any doubt on the propriety of the decision which upholds the constitutionality of the law. The only question for me is whether the filing of such charges by a judgment creditor is a new suit which ought to be stayed under section 21 of the bankrupt act, which prohibits a creditor whose debt is provable under the act from prosecuting to final judgment any suit at law or in equity therefor, against the

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bankrupt, and requires "any such suit or proceedings" to be stayed to await the determination of the court in bankruptcy on the question of the discharge. It is argued with much force that "any such suit or proceedings" includes something more than any suit at law or in equity, and will cover any legal mode of enforcing payment of a provable debt. And I am very much inclined to think that this is so, and that a creditor who should undertake to prosecute a proceeding in admiralty or to seize on execution after-acquired property of the bankrupt, would be within the scope, as he clearly would be with the mischief of this section. If this be so, no creditor holding a provable debt can prosecute any proceeding for its recovery pending the bankruptcy. But the difficulty here is that all the original action is on the part of the debtor. He was under arrest before the proceedings, and the law has seen fit to provide that he shall not be released from such an arrest by *habeas corpus*. It seems to me to follow that equity cannot relieve him, because equity, in such a case, follows the law, and never undertakes to relieve against lawful arrests. Then the debtor applies for the benefit of the State law, and that unfortunately gives relief only in certain cases. If the debtor can show a compliance with that law he is discharged, otherwise not. And the charges of fraud, though declared to be a sort of suit at law and ordered to be conducted accordingly, are incidental, not to the recovery of the debt, but to the attempt of the debtor to take the benefit of the statute. They are, say the supreme court of Massachusetts, "intended to be used as an answer or plea in bar to the debtor's application for the benefit of the act." . . . "No such charges can be made as an independent distinct substantive process against the debtor. They are only incidental to the previous proceedings commenced by him to obtain his release from confinement:" *Parker v. Page*, 4 Gray, 533. If this be the true nature of these charges, it is not a suit or proceeding to recover a debt, but a counter plea to prevent the release of the person of the debtor lawfully in arrest, and I cannot hold that it ought to be stayed, because I should thereby give the debtor the benefits of the Massachusetts act, without its disadvantages, and be in effect saying that the creditor might oppose his taking the oath, if he would do it in a way which should be entirely agreeable to the debtor.

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The bankrupt having before his bankruptcy given a recognizance to take the poor debtor's oath, or surrender; and the arrest not being avoided by the bankruptcy, I have no right to avoid it indirectly by requiring the proceedings under it, and which are instituted at the debtor's instance, to be conducted in any particular manner, or to be stayed in part, for his further advantage. The filing of the charges does not appear to be a suit or proceeding for the recovery of the debt, more than would be the renewal of the execution, or the charging in execution, or any other matter incident to the lawful arrest. This is the whole gist of the case.

I do not say that the magistrate ought not to admit him to take the oath notwithstanding the charges. I have no right to meddle with this.

There appears to be some reason to suppose that the justices of the circuit court may entertain a different opinion upon this question, and I need not say that I shall cheerfully acquiesce in any rule they may lay down. Until they have decided the point I must act upon my own carefully considered opinion.

The answer of the defendants brings up the whole merits of the case, and my decision is intended to be final in this court, so as to allow of an appeal.

Bill dismissed.

Re MARSHALL.

AUGUST, 1870.

Property acquired in gaming is assets, which, if the bankrupt spends in gaming, he loses his discharge.

LOWELL, J. The objection to the bankrupt's discharge is that he lost a part of his property in gaming. The evidence tends to show that he was interested in a gambling house in Boston, and that he did lose money at that house and in some others like it. The preponderance of evidence supports the allegation of losses sustained in that way. On the other hand, the evidence for the

Re Marshall.

defence tends to show that the bankrupt had lost all his property some years ago, so that whatever he may from time to time have made or lost, he is no worse off now than if he had never lost at all. From this the argument is deduced that he never had any property to which creditors had a right to trust, and cannot justly be said to have lost any property in gaming. It is said that, if the law should be rigidly applied in such a case, the creditors would receive an undue advantage, because they could always prevent the discharge of a person to whom they had given credit with a full knowledge of the character of the business, and an understanding of its hazardous nature.

So far as this argument applies to gambling debts the bankrupt would have the remedy in his own hands, because the debts, if objected to, could not be proved against his estate; as it regards other debts, much of its force would depend on the circumstances under which each particular debt was contracted. A creditor may know that his debtor has property without knowing how he acquired it, or he may lend him money or sell him goods for some legitimate purpose without reference to his occupation. And such are some, at least, of the debts in this case. I cannot limit the general language of the statute, though its effect may be, and I think is, to consider property acquired in gaming to be assets, which, if the bankrupt spend in gaming, he loses his discharge. It is impossible to look into the mode in which such property as the statute speaks of has been acquired. If property once in the possession of the bankrupt is spent in gaming, which, if not so spent, would be assets in bankruptcy, the case is made out. It is too late after it is spent to say that it was unlawfully acquired, or acquired in any particular way, or that creditors are no worse off on the whole. The case does not by any means show that whatever the defendant won was lost immediately, but rather that he had considerable sums at times, which he afterwards lost. I cannot distinguish such losses from those which any other debtor might sustain in a similar way. The statute is clear and explicit, and cannot be construed away in favor of one whose profession is gambling, though its operation may be somewhat severe in such a case. Neither the knowledge of his creditors of his course of business, nor any intent on his or their part, is material. The fact only can be inquired into. Nor does the

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law in the matter of discharge invest the court with discretion, as it does so largely in England. It is a mere question of legal right.

Discharge refused.

S. J. Thomas & G. F. Verry, for the objecting creditors.

J. Nickerson, for the debtor.

THE BOSTON.

AUGUST, 1870.

It seems, that the owner of the whole cargo of a vessel may order her discharge at any suitable place within the port.

Under the bill of lading now in use in the coal trade, the consignee has a right to choose the place of discharge.

Where the consignee had indorsed such a bill of lading back to the original shipper, and the master was seasonably notified of the fact, he was bound to take the vessel to the wharf to which he was ordered by the shipper.

A master having failed to deliver a cargo of coal according to the terms of his contract, the vessel was libelled in the admiralty, and it appearing that since the libel was brought the shipper had replevied the coal, the assessment of damages was postponed until the replevin suit should be determined.

In a libel for not delivering coal according to the terms of a bill of lading, by landing it at a wrong wharf in the port of discharge: *held*, the measure of damages was the value of the coal less the freight and charges, although the freight had not been earned.

The counsel fees of a replevin suit by the shipper to recover his coal are not to be included in the damages assessed in the action for not delivering.

AFFREIGHTMENT. — The libellants, Louis J. Audenried & Company, coal merchants, doing business in Philadelphia and Boston, shipped a cargo of coal on board the schooner Boston at Philadelphia, and received a bill of lading requiring delivery at Boston to Bosworth & Hamlin or their assigns, at a freight of two dollars and twenty-five cents per ton and three cents per ton for each bridge. There was the clause lately introduced by an association of ship-owners into these contracts for carrying coal, and which has been under consideration several times in this court, that twenty-four hours after arrival at the port, and notice thereof to the consignee, the vessel should be discharged at the rate of one hundred tons per day, after which the consignee or assignee should

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pay demurrage. The libellants had an open contract with Bosworth & Hamlin, the consignees, for a large amount of coal to be delivered from time to time during the season, and intended this cargo for them; but they were unable to receive it, and so notified the libellants, and indorsed the bill of lading to them before the arrival of the vessel. Hearing that the schooner was in the harbor of Boston, Bosworth & Hamlin sent word to the master that he was not to deliver his coal at their wharf; but he came up to the next wharf to theirs, and was again told by one of the firm that they should not take the coal, and that he must report to the libellants, which he did. The libellants thereupon ordered him to discharge at the wharf of Cook, Jordan, & Morse, and this he refused to do. They then procured from the original consignees a written order of similar purport, but with no better result. Some negotiation was had between the parties, but nothing came of it, and the master, after some days, landed his cargo at the wharf to which he had first come, to be held subject to the order of the libellants on their paying freight, demurrage, and other charges, if any; and the libellants thereupon proceeded here for non-delivery of the cargo.

D. Thaxter, for the libellants.

P. H. Hutchinson, for the claimants.

LOWELL, J. The claimants insist that the master might deliver his cargo at any suitable wharf, with notice to the consignee or his assignee, and thus fully meet the requirements of his contract; and that this was such a wharf. It is often said in the books that this is the master's whole duty, but I am of opinion that the proposition has been sometimes understood a good deal too broadly. The *dictum* of Mr. Justice Buller, in *Hyde v. Trent and Mersey Navigation Company*, 5 T. R. 389, 397, is that a delivery on the usual wharf will discharge the carrier. And in *Chickering v. Fowler*, 4 Pick. 371, the case finds that the cargo was landed at a usual wharf, and it was held that it need not be landed at the wharf of the consignee. There are cases which recognize it to be usual at this port and at others for the master of a general ship to go to a suitable wharf and notify the consignees, who are then bound to take their goods from the wharf: *The Tangier*, 21 Law Rep. 8; *Cope v. Cordova*, 1 Rawle, 203. But these cases have not turned on the question what was a suitable or usual wharf.

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This would seem to be a question of fact, and one which may be answered very differently in different cases. The law, as I understand it, is, that the master is not in general bound to transport the goods on land, but his contract is fulfilled by delivery from his ship at a proper place within the port. Still, the question is always one of delivery in the particular case, and if he has not delivered to the consignee or shipper personally, he must justify his substituted delivery: *Gatliffe v. Bourne*, 4 Bing. N. C. 314, 3 M. & G. 642, 7 M. & G. 850; *Humphreys v. Reed*, 6 Whart. 435; *Hemphill v. Chenie*, 6 Watts & S. 62; *Ostrander v. Brown*, 15 Johns. 39. This he may do by showing that the delivery was in accordance with the terms of his contract, or with the usual course of trade at the port, or of the course of dealing between the same parties. Here I have not been shown any such usage. There is no evidence of what is usual or suitable in respect to cargoes of coal; but considering the heavy nature of the cargo, which makes its transportation on land very costly, I am led to doubt whether a usage to land such a cargo at a distance from the owner's wharf could be considered reasonable. In the absence of evidence of usage, I lay down the rule of law, as I did in another case,¹ that when there are two or more wharves in the port equally convenient to the carrier, he is bound to deliver at that most convenient to the shipper, at least if he be duly and seasonably notified of such preference. And where one shipper or consignee owns the whole cargo, he has, in my opinion, the same right that a charterer would have to say where the vessel shall discharge, it being, of course, a suitable place and within the limits of the port.

This point is not of vital importance here, because this bill of lading contemplates that the consignee, and not the master, is to choose the place of delivery. I have more than once construed this new demurrage clause to mean that the owner of the coal is to have twenty-four hours after notice of the ship's arrival in which to find a berth for her discharge. This construction has not only been acquiesced in, but insisted on by the ship-owners. So the provision that the freight should be increased by each bridge that the vessel may pass through, cannot mean that the master shall

¹ *The E. H. Fittler, supra*, 114.

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have the right to disregard the shipper's wishes and go to a distant wharf through unnecessary bridges, and thus increase his freight while disobliging the other party; but that so many as the consignee or his assignee requires him to pass through shall be paid for.¹

It was the duty, then, of the master to deliver at the wharf of Cook, Jordan, & Morse, according to the order given him by the libellants within twenty-four hours after notice of his arrival, and indeed, at the very time when, in accordance with his contract, he reported to them his arrival. If he had any doubt whether they were the proper persons to deal with, it was removed by the orders and statements of the original consignees and by the indorsement of the bill of lading. He says, in his answer, that he at one time offered to go to the required wharf if the libellants would pay the towage. This they were not bound to do under the circumstances of this case, because he should have gone there at once. Again, he says he at one time offered to go if they would pay him, in advance, his freight and demurrage. But they were not bound to pay freight until the goods were delivered, nor could any demurrage be due when the delay was wholly his fault. At the argument, it was urged in addition to these points, that the wharf of Cook, Jordan, & Morse is not within the port of Boston. I was asked to limit the bounds of the port to the open harbor below the numerous bridges which surround the peninsula on several sides, and which are said to have changed the character of the navigation and to have imposed new and unusual burdens upon ship-owners. In this case, I need only say on this head that no evidence whatever of usage was introduced; that this is an old and well-known coal wharf within the most ancient limits of the town of Boston, and that the bill of lading provides for going through bridges.

It was said at the bar that since the pleadings were made up the libellants have taken the cargo by a writ of replevin out of the hands of the wharfinger, with whom it was left by the claimant. This being so, I cannot fairly estimate the damages in this case until that suit is in some way disposed of.

Interlocutory decree for the libellants. Damages to be assessed.

¹ I am informed that a similar ruling as to the duty of the master was made in the replevin suit by Brigham, C. J., in the superior court.

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This would seem to be a question of fact on again, and it was answered very differently in different cases to a jury, and had to stand it, is, that the master is not in default in nominal damages, and goods on land, but his contract is with the consignee and had been satisfied. The ship at a proper place within the time, and proved that the coal was one of delivery in the particular quantity between the day it should be delivered to the consignee or shipper. The time of the service of the writ of habeas corpus delivery: *Gatliffe v.*

642, 7 M. & G. 850; *F. v. Plants*. It was suggested by the court at *hill v. Chenie*, 6 Watts, that the measure of damages would be the value of the goods. This he may do by deducting freight. If this be so, we can have only with the terms of the contract, because the freight was more than the diminution at the port, or of the goods. We must give credit for the goods now that we have. Here I have no doubt there will be nothing left to assess. We contend: of what is the carrier's duty? If he misdelivers goods, or refuses to deliver to the consignee, he has forfeited his freight, and the shipper may sue on the bill of lading for the full value without deduction. The dissenting opinion, which reconciles all the cases is this, that mere non-delivery is not a conversion, but misfeasance is: *Sayward v. Wood*, 10 Gray, 107; 8 ib. 215; *Robinson v. Baker*, 5 Cush. 17; *Berlin v. Nye*, 10 Cush. 416. The case of *The Cassius*, 2 M. & S. 81, is consistent with the above, because there the master returned his freight, and afterwards converted the goods.

The master converted our goods and we have recovered them, and are bound to give credit for the value recovered, less the expenses of the recovery: *Williams v. Archer*, 5 C. B. 318; *Archer v. Williams*, 2 C. & K. 26; *Forbes v. Parker*, 16 Pick. 466; *Woodman v. Gelston*, 1 Johns. 134; *Rice v. Nickerson*, 9 Allen, 478; *Addison on Torts*, 443. This should include counsel fees.

P. H. Hutchinson, for the claimants.

LOWELL, J. The able argument for the libellant has failed to convince me that in an action of contract for not delivering goods in conformity with the bill of lading, the measure of damages is the value at the port of delivery, without deduction. I have used a different rule in two cases in which goods were injured by deviation and delay, namely, the value less the freight. This furnishes an indemnity, as we see in this case; for the libellants had sold the cargo in good faith, and would have realized the price, after

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paying the freight, if the master's contract had been fulfilled ; and the exact loss which they have suffered is the price, deducting the freight. It is urged that the vessel never earned freight, and this is true ; but the question here has nothing to do with that. I am not giving freight to the claimants, nor denying it to them, but ascertaining the loss to the libellants. They had the right to take their goods if they could find them, without paying freight, as indeed they have done ; and by that means they would and must get more than an indemnity ; but in an action for not delivering, they are entitled to an exact indemnity. It was at one time much contested whether the damages in such a case should not be the value at the place of shipment, with interest, but it has been fully settled that it is the value at the port of destination. Some of the cases do not touch the question whether it shall be the gross or the net value, but all which do mention it say it is the net value after deducting expenses ; for the reason that those expenses go to make up the value. Thus, in what may be fairly called the leading case of *Watkinson v. Laughton*, 8 Johns. 213, where goods were embezzled by the crew, it was held that the damages were their net value, deducting freight and other charges, not, of course, as actual charges, but as the true mode of finding the exact loss sustained. This rule has been followed in *Gillingham v. Dempsey*, 12 S. & R. 188 ; *The Cassius*, 2 Story, R. 81 ; *Nourse v. Snow*, 6 Greenl. 208 ; *The Joshua Barker*, Abbott, Adm. R. 215.

A wrong-doer may often be required to give up chattels without any allowance for what has been spent upon them, and a carrier could not, perhaps, set off nor recoup freight which he had never earned ; but this is not such a case. This libel is not brought for the recovery of the goods or of their value, but for the breach of a maritime contract to carry and deliver them ; and though the value of the goods is an element in the computation of damages, the real question is, what has the libellant lost ? And the true answer is, what he would have had if the contract had been performed. Suppose the voyage had been from a foreign country, and the goods had been subject to duty ; in estimating the damages, duties would be deducted from the value in the market here, without any regard to whether the carrier had paid duties or not ; because the libellant would have been obliged to pay them to obtain the

Re W. B. Alexander. — Re J. F. Alexander.

full market value of his goods, and they really go to make up that value.

It is admitted that the libellants must give credit for the net value of the coal replevied by them, but they contend that in estimating this value they may deduct the reasonable counsel fees of the replevin suit. None of the cases cited came up to this contention, and I am of opinion that they cannot be allowed. Counsel fees are sometimes considered in estimating the damages in salvage cases even since the fee bill has prevented their being taxed as costs, and where one is bound by contract to warrant another's title, and has been duly notified to defend an action on the title and has failed to do so, these fees may be recovered. But here the suits were simply two actions for nearly the same cause, and were adversary, and probably if the claimant had required it, the libellants might have been put to their election which they would maintain. Under these facts there is no more reason for allowing the counsel fees in this case than in the replevin suit itself. The theory of the judgment in that suit was that the taxable costs would indemnify the plaintiffs. They have recovered their coal and their costs, and after giving credit for its value when replevied there is no surplus left to be assessed in this action. As the present defence is in the nature of a *plea puis darrein continuance*, the libellants are entitled to nominal damages, and costs. *Decree for the libellants for \$1 and costs.*

Re W. B. ALEXANDER. — Re J. F. ALEXANDER.

SEPTEMBER, 1870.

One who holds the note of the bankrupt not yet due, has a good petitioning creditor's debt.

A creditor who holds security from the supposed bankrupt may petition for adjudication against him, if the security falls short of the debt by two hundred and fifty dollars or more.

It is no defence to a petition *in invitum* that the petitioning creditor is the only creditor of the supposed bankrupt.

A gift of all a debtor's property to his wife is an act of bankruptcy.

Re W. B. Alexander. — Re J. F. Alexander.

If land stands in the name of the debtor and is conveyed by him for the apparent purpose of avoiding attachments, it is doubtful whether parol evidence ought to be received that the land was held only in trust.

It seems, that a creditor of a bankrupt holding security on the property of a third person, may prove for his whole debt without renouncing such security.

BANKRUPTCY.—These petitions for involuntary bankruptcy against the several defendants were tried together by consent of the parties. The defendant, James F. Alexander, bought out the stock in trade of the petitioner, O'Connell, in February, 1869, for about twenty-four hundred dollars; of which five hundred dollars was paid down, and for the remainder the two defendants gave their joint and several promissory notes on one, two, three, and four years, with interest at eight per cent a year, payable semi-annually, secured by a mortgage on the stock in trade. William B. Alexander, the father of the other defendant, had no interest in the purchase, but joined in the notes for the greater security of the petitioner, and, as between the two defendants, was a surety only.

In February, 1870, the first note became due and was paid, together with the interest on the whole debt. The next note will be payable in February, 1871. On the thirteenth of February, 1870, the father conveyed his dwelling-house and land at East Boston to his wife. He was not and never had been a trader, and he had no other estate or effects liable to seizure on execution, and owed no debts excepting to this petitioner. In March the son conveyed to his wife a dwelling-house and land which had stood in his name for about two years. Evidence was admitted, *de bene*, to show that he held the house by gift from his father-in-law, upon an oral trust or understanding that it should be used, enjoyed, and conveyed for the benefit of the grantor's family, including the defendant's wife. The conveyance to the wife was made without the consent or knowledge of the father-in-law, who heard of it but lately, not long before this petition was filed, and testified that he acquiesced in the arrangement. This defendant owed no debts of any consequence, excepting the mortgage debt, and one to his aunt, of whom he borrowed the five hundred dollars paid out in the first instance towards the purchase of this stock. The evidence tended to show that this debt would not be pressed against him.

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LOWELL, J. Several points of law have been ably discussed before me, and I will consider them in their order.

1. The fact that the petitioner's debt is not yet payable is not a valid answer to this proceeding. By § 39 all creditors whose debts are provable under the act may petition; and by § 19 debts existing but not payable until a future day, are provable. It was so under the act of 1841: *Barton v. Tower*, 5 Law Reporter, 214; and the practice has always been so under the insolvent law of this commonwealth. It would be a sad defect in a bankrupt law if the rights of creditors depended on the time at which their debts matured.

2. The next objection is that a creditor who holds security cannot petition. Here an important distinction is to be noted. This creditor has no security upon the property of W. B. Alexander, and the language of § 20 is that a creditor who holds security upon the property of the *bankrupt*, shall be admitted to prove only for the balance, &c. This would seem to show that the petitioner has a provable debt for the full amount against the estate of the *father*, because his only security is on the estate of the *son*. Such has always been the practice in England, and I am much inclined to think it the true practice. If the surety pays the debt, he may be entitled to the benefit of the collateral security. But in bankruptcy it seems more just and equitable that the creditor should have the benefit of all his remedies, so that he may obtain his whole debt, if possible. If he is obliged to realize his security, and prove only for a balance, he will be losing the advantage for which he has stipulated, of the full credit of the surety. A contrary doctrine appears to have prevailed in Massachusetts: *Lanceton v. Wolcott*, 6 Met. 305; but I am not prepared to say that I could follow that precedent, nor that the statutes are precisely alike on this point. Judge Fox has ably vindicated what I believe to be the true doctrine under the bankrupt law. It is not necessary to decide the question in this case, for reasons which will presently appear.

3. The next question is whether a creditor who holds a mortgage upon the property of his debtor, can proceed against that debtor himself by petition in bankruptcy. By § 20 such a petitioner can be a creditor only for the balance, after deducting the

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value of the property, which value is to be ascertained by agreement with the assignee, or by a sale under direction of the court. The argument is that until an assignee is appointed it cannot be legally ascertained whether such a mortgagee is really a creditor or not. This appears to me too strict and literal a construction. Take the case of an admitted act of bankruptcy, and of creditors whose security is plainly inadequate. Are they to be without remedy? No better illustration than this case affords could be desired. If this creditor cannot petition there is no other person who is interested to do so, and after the six months have passed he is without remedy. I have known a case in which all the creditors were secured, and none of them adequately. The true intent and equity of the statute will be met by holding that when the security falls short of a full indemnity, by two hundred and fifty dollars, or more, thus leaving the amount of a petitioning creditor's debt practically unsecured, the debt is sufficient. This will be a question of fact like any other, and no more difficult to decide than such as often arise on a disputed account or other debt sufficient in kind. This is the law of England by the express words of 24 & 25 Vict., ch. 134, § 97. I do not wish to be understood that a creditor holding collateral security may not petition, if he offers to surrender and cancel his security, nor that any security by attachment or other lien created by law would usually be a bar; but my opinion is that full and adequate security created by contract, must be abandoned, and that if inadequate it must be so to the extent above mentioned.

4. It is no defence in bankruptcy that the petitioner is the only creditor, nor that he has an adequate remedy at law or in equity in the state or federal courts. The bankrupt law protects all creditors, and is additional to other remedies in all the cases to which it applies. This creditor alleges in his petition, and has proved to my satisfaction that his security falls short by more than two hundred and fifty dollars, and I must hold him entitled to proceed.

5. Have the acts of bankruptcy been established in evidence? It appears that W. B. Alexander has conveyed a homestead of some considerable value, and which was his whole property, to his wife. The effect necessarily is to delay creditors, and the

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intent ought to be presumed. The defendant testifies that his only purpose was to give his wife a home, and that the petitioner's debt was not in his mind at the time. But he was not in trade; there was no one but this creditor against whom the homestead needed protection, and the intent to give his wife a clear homestead necessarily involves the intent that this creditor should not reach it. I have often decided that the conveyance of the whole property of a trader to a pre-existing creditor affords a very violent presumption of a fraudulent intent. And a gift of the whole estate of any debtor is *per se* fraudulent.

In the case of the son the evidence is not so clear that he had any thing to convey. But considering that by the statute of frauds of the commonwealth parol evidence could not be admitted to prove such a trust as is here relied on, so that in case of attachment before the conveyance was made, the beneficial interest would be conclusively held to be in the defendant, I doubt if he ought to be admitted to show these alleged facts, even on the question of intent. But if the evidence is received, still the peculiar circumstances of the case seem to show that the defendant may have had some beneficial interest which he intended to withdraw from the grasp of his creditors; such seems to be a fair inference from the time and mode of the conveyance. The father and son made their deeds near about the same time, which was soon after the payment of one of the annual notes, and it must then have been evident to them that the stock in trade had been reduced in value below the amount of the mortgage debt; there were no other creditors and no apparent adequate motive for the acts, excepting the wish to confine the mortgagee to the property secured to him, and I cannot but think it a fair inference of fact, independently of legal presumptions, that the real intent was to delay and hinder the petitioner.

6. It was shown that the petitioner had acted in a harsh and even oppressive manner towards the defendant James, in respect to the foreclosure of the mortgage. This evidence was admitted only for its bearing upon the credibility of the petitioner, who was a witness in the case. It cannot affect the merits of this petition. I may, however, be permitted to observe that this seems to be a case in which the parties would do well to compromise the matter,

The Charles F. Perry.

by giving the petitioner adequate security for his debt. It is unfortunately true that the expenses in bankruptcy bear a large proportion to that part of the petitioner's debt which remains unsecured. Still it is not a matter of discretion but of strict right that he should be permitted to proceed here if he chooses to do so.

Adjudication ordered.

J. D. Ball, for the petitioning creditor.

J. H. Bradley, for the respondents.

THE CHARLES F. PERRY.

SEPTEMBER, 1870.

A seaman who was shipped as cook on a foreign voyage, and who performed extra services as stevedore in a foreign port, may proceed in the admiralty for compensation for the extra services, though his wages as cook have been paid in full.

WAGES. — The libellant shipped at New York in January, 1870, on board the Charles F. Perry, for a voyage to Rosario, in South America, and back to Boston, at thirty dollars a month. At the foreign port he did the work of a stevedore, by the request of the master, and thus saved a considerable sum to the vessel, besides paying a man to do his work as cook. His services as stevedore were much more laborious and valuable than those of a cook. The special bargain alleged in the libel was not found by the court to be proved, but he was considered, on the facts, entitled to a *quantum meruit*.

C. G. Thomas, for the libellant.

H. C. Hutchins & H. H. Currier, for the claimants. The court has no jurisdiction to enforce payment of a stevedore's wages: *The Amsdell*, 1 Blatch. & H. 215; *The Thomas Scattergood*, Gilpin, 1.

LOWELL, J. I do not care to criticise the cases cited for the claimants, though I doubt their soundness. This is not a libel by a stevedore for stowing a vessel, but of a cook demanding extra wages for work done on board the vessel beyond the limits of his original contract, and not so sharply distinguished from it that he

The Charles F. Perry.

is obliged to split his bill into two parts, and proceed for one here and for the other at common law. This case is much like those in which Judge Sprague held that where the principal contract was maritime, the jurisdiction of the admiralty would not be defeated by the fact that some incidental services were performed on land: *The Mary*, 1 Sprague, 17; *The Canton*, ib. 437; *The Brookline*, ib. 105. There are many voyages in which the seamen perform more or less work on shore, as in a trading voyage to the west coast of America for hides, made famous by Mr. Dana's book; or in the pursuit of seals and sea elephants, voyages which I have often settled in this court. So captures in time of war made on land by boats' crews sent from a public ship are held to come within the province of the prize courts: *Lindo v. Rodney*, 2 Doug. 631 n. It is true that the admiralty courts in England, before the year 1861, were prohibited from entertaining suits upon special contracts, and they were accustomed to strike out of the libel any items of charge which had such an origin. But this illiberal and inconvenient course which was forced upon those courts by superior authority, against their protest, has never obtained in this country, and has now been abrogated in England.

I am clearly of opinion that where a seaman is entitled to payment for incidental services performed in the course of the voyage, whether by virtue of his original contract or not, his whole demand may be recovered in a suit against the vessel in this court, though a part of the work done, taken by itself, would not be considered of a maritime nature. I cannot see that it makes any difference whether the original contract or some additional and supplementary contract is appealed to. After the bargain is made the parties have the same rights as if it had been agreed in the beginning.

It is suggested, indeed, that here the contract wages have all been paid, leaving only those as stevedore to be recovered. But this is a mere accident. It may with as much truth be said that a sum equal to the wages has been paid, on account. The mode and time of payment cannot sever the demand and oust the jurisdiction, if the whole cause of action were fairly within the cognizance of this court before the payment was made.

Decree for the libellant for \$84 and costs.

Re THE WHIPPLE FILE COMPANY.

SEPTEMBER, 1870.

The assignees of a bankrupt manufacturer selling his goods in the course of their trust in the condition in which they found them, are not bound to pay the tax imposed by the act of 31 March, 1868, on sales by manufacturers.

BANKRUPTCY. — The assessor of internal revenue of the third collection district of Massachusetts and the assignees of The Whipple File Company, a bankrupt corporation, submitted to the court, by an agreed statement in accordance with § 6 of the bankrupt act, the question whether the assignees were liable to be assessed under the act of 31st March, 1868, 15 Stats. 59, as manufacturers, for the excess over five thousand dollars, of the amount of the sales of goods of the company which they had disposed of in the execution of their trust by order of this court in bankruptcy.

J. C. Ropes, assistant district attorney, for the assessor.

T. K. Lothrop, for the assignees.

LOWELL, J. The Whipple File Company was a manufacturer within the act, but not so the assignees of the corporation in bankruptcy. If they had done any thing in the way of finishing the goods, as I authorized the assignees of McKay & Aldus to do, it may be that they would be liable not only to this assessment but to pay the special tax imposed on manufacturers. But as they did nothing but sell the goods, they are no more manufacturers than any of those persons who bought goods of them.

Nor can it be said that they are the agents of the manufacturer. They are trustees appointed by the creditors under the authority of the court, and not by the bankrupt, and their sales are not the bankrupt's sales. These goods have reached the market, undoubtedly, without being taxed, but this is by the misfortune of the owners who ceased to be able to sell and pay the tax upon them.

If it be contended that the assignment was a sale, the answer is that it was rather a statute execution and probably not within the scope of the act. At all events the assignment took place after the bankruptcy, and cannot be the foundation for a debt either privileged or common against the assets.

Judgment for the assignees.

Re Chandler.

Re CHANDLER.

OCTOBER, 1870.

One who prepares for market and sells lumber, the growth of his own land, is a manufacturer within the meaning of the bankrupt act as amended by the act of July 14, 1870.

The commercial paper mentioned in § 39 of the bankrupt act includes not only the notes, bills, &c., given by a merchant or other person mentioned in the section in the ordinary course of his business, but all negotiable paper. The terms are descriptive of the kind of paper, and not of the mode in which it was in fact issued or used in the given case.

The failure of an accommodation indorser to pay the note for fourteen days after his liability has been duly fixed, is an act of bankruptcy, if there is no defence to the note in the hands of its holder, and if the indorser is a manufacturer.

PETITION *in invitum* heard by the court on an agreed statement of facts with some supplementary evidence admitted by consent. The defendant was a member of the bar, but had of late retired from active practice and carried on, among other things, a steam saw-mill, in which he prepared, by his agents, boards and shingles from lumber grown on his own land, and sold them in the market. He was liable on a large number of negotiable notes which he had indorsed for the accommodation of H. Woodman, and Woodman was liable on a less number indorsed for the accommodation of the defendant. The petitioner held one of the former notes which he bought for value before its maturity, and which had been dishonored and duly protested more than fourteen days before the petition was filed.

H. D. Hyde, for the petitioner. The defendant is a trader by reason of his lumber business, and of his practice of raising money by exchange of notes. If not a trader he is a manufacturer. The note held by the petitioner is commercial paper.

G. S. Hillard, for the defendant. There is no evidence of trading. The English cases, which are very numerous and perhaps not entirely harmonious, yet all agree that one who merely sells the produce of his own land is not a trader.

The note set out in the petition is not commercial paper within the true intent of § 39: *Re Lowenstein*, 2 B. R. 99; *Re The McDermott, &c., Co.*, 3 B. R. 33, which decide that the paper must not only be given by a merchant but in the course of his business.

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LOWELL, J. I am disposed to agree with the argument of the defendant's counsel that one cannot be a trader unless he buys as well as sells, but is not Mr. Chandler a manufacturer? One who works up lumber on a considerable scale is popularly called a manufacturer of that article, and such lumber is spoken of as manufactured in our tariff acts and treasury regulations, and in the lately repealed treaty regulating commerce with Canada. If so, the fact that the manufacturer uses only lumber which he grows himself does not appear to be material. It is not like the case, put in argument, of a farmer making cider or cheese, for two reasons: These products when made by the farmer exclusively from his own farm, are not usually made on so large a scale as to be called a manufacture, as the word is now commonly used, and the making is one merely incidental to the cultivation of his land, like curing his hay, &c. But in the case of the lumber business, the land may be almost said to be incident to the lumber, which usually forms its chief value, and the manufacture itself is the main source of profit, independently of any cultivation or other use of the land. In this respect the business of the defendant seems more analogous to that of a miner, who is made subject to the act, and as to whom it would hardly be contended that the ownership of the land was material.

If, then, the defendant is a manufacturer, has he suspended payment of his commercial paper? Upon this point I am referred to two cases which hold that the paper mentioned in the statute is such as is given by a merchant or trader in the direct course of his business, and not for a mere loan of money, though the money may have been used in his business, and still less for any dealing outside of his trade. Some cases that were not cited are of a different tenor: *Heinsheiner v. Shea*, 3 B. R. 46; *Re Nickodemus*, 3 B. R. 55; *Re Hollis*, 3 B. R. 82. In these cases the term commercial paper is said to be descriptive of a certain sort of contract. Thus in *Nickodemus's* case, Judge Withey expresses the opinion that it refers to bills of exchange, promissory notes, and negotiable bank checks, paper governed by the rules which have their origin and are established upon the custom of merchants. "Such paper," he says, "is usually denominated commercial paper, and we must presume congress used the term in its common acceptance, rather

than in a more restricted sense." Similar opinions are given in the other cases cited. Judge Withey finds support for this construction in the fact that bankers, who are not engaged in commerce, strictly so called, are within the act, and this view is much strengthened by the amendment, which adds brokers, manufacturers, and miners to the persons the dishonor of whose obligations is an act of bankruptcy. It is of the utmost consequence to preserve the uniformity which the constitution and the law intend should be established in this important branch of commercial jurisprudence, and this uniformity will in so far fail to be attained as the statute is differently construed by different tribunals. In this case, however, since I find the diversity already existing, I must choose between the opposing views, and after the most careful deliberation I consider the more enlarged construction to be the true one. Bills of exchange have their origin and derive their peculiar properties from the custom of merchants. Thomas Malynes, merchant, writing in 1629, before promissory notes had come into use in England, thus quaintly expressed himself: "The nature of a bill of exchange is so noble and excelling all other dealings between merchants that the proceedings therein are extraordinary and singular, and not subject to any prescription by law or otherwise, but merely subsisting of a reverend custom used and solemnized concerning the same." *Lex Mercatoria*, part 3, ch. 5. And he explains at great length how different the rights and duties of the parties to such a contract are from those arising under any contract known to the common law of England. It is familiar learning that the mode of declaring on a bill of exchange was, that it had become due and payable to the plaintiff according to the custom of merchants, and this was a necessary allegation. When notes of hand became common, similar declarations were framed upon them, but the courts refused to admit the validity of a custom to pay a note to the indorsee without an express promise to that effect, because, they said, it would tend to defraud the promisor, who might have already paid the note to a former holder, and they denied to the holder the right to sue according to the custom of merchants: *Clerke v. Martin*, 2 *Ld. Raymond*, 757. Immediately after this last decision, the statute 2 & 3 Anne, ch. 9, afterwards made perpetual, was passed, which recited the fact of

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such a decision, and proceeded for the encouragement of trade to place negotiable notes, for the payment of money, upon the same footing as inland bills of exchange, and declared that they should be assignable to and suable by the holder *according to the custom of merchants*. This phrase is used repeatedly throughout the act. This statute has been copied in many of our States, and adopted in others as part of their common law: Story on Notes, § 6, and note 2; 3 Kent Com. 72, and note *a*.

Such negotiable paper therefore stands by usage and by statute upon the custom of merchants, and is controlled and regulated by such custom. And these regulations are always treated as part of the law merchant. Now in saying that any person belonging to one of certain designated classes should be deemed a bankrupt if he failed to pay his commercial paper, it seems to me that congress simply referred to a well known and very conclusive test of insolvency. If a trader allows his paper to go to protest, he is said to have failed or suspended. The expressions are used as equivalent. It is like the closing of the counting-room and denying one's self to creditors of the old English bankrupt law. In this point of view, it makes no difference in reason that the particular note which is dishonored was not given in the regular course of the business of the promisor; the obligation to pay and the inference from neglect are equally stringent. In the bankrupt court we have occasion to know that accommodation notes are often so made as to simulate notes given for merchandise, because the latter command a higher price in the market, but the rights of the *bond fide* holder are the same in both cases. It seems more just and reasonable to conclude that congress intended to designate a certain kind of promise, well known to and governed by the law merchant, and not to give a peculiar sanctity to such as happens between the first parties to it to have originated in a particular way, thus instituting an inquiry which appears wholly immaterial to the purpose in hand, and not admissible in any other form of action, and unjust to the holder of the paper. It is as if the law had enumerated the various kinds of promise, instead of designating them by a comprehensive term, which Judge Withey says is commonly used to designate such paper. While, therefore, I agree with the defendant that commercial means mer-

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cantile, and that mercantile means pertaining to trade, yet I can by no means adopt the conclusion that the particular bill or note must be in any way connected with commerce or trade, but rather that it must be of that class which commerce introduced and still deals in. If congress had said that when a merchant, &c., had stopped payment, he should be deemed bankrupt, unnecessary litigation might have arisen out of the non-payment of open accounts which are much used of late years, between wholesale dealers and their customers in trade, and they therefore fixed upon that kind of promise which is payable on a day certain, and the dishonor of which is a sure test of insolvency. The defendant testified to his understanding that "commercial paper" was used in State street in contradistinction to "accommodation paper." Judge Withey, on the other hand, in the passage already twice cited, says the phrase is commonly used to mean such paper as comes within the purview of the law merchant. No doubt a distinction is made in the market between these classes of notes or bills, but I do not profess to be acquainted with any usage so general throughout the country as to enable me to construe the phrase used in the statute as a term of art intended to distinguish between them, or as having any other technical meaning. In the books on trade the term used is "*real bills*," to designate those given in a genuine transaction between dealers, and I have heard the expression "business paper" applied in the same way. But I am not satisfied that the phrase in the statute is intended to have that meaning, or that it in fact has it according to any wide-spread usage. It seems improbable, because such paper is equally sacred in the hands of the *bond fide* holder, and the failure to pay it is as sure a test of insolvency, and an inquiry into the origin of such contracts is never admissible for any purpose or in any court in a suit by such a holder. If there is any defence which affects the holder, the remedy is ample, because the failure to pay such a note would not be a suspension of payment; but beyond that the inquiry would be unreasonable and embarrassing, and would often present advantages to a defendant whose dealings have been somewhat irregular and unusual, which I do not believe the statute intended to give. Many, perhaps most, of those traders who are obliged to suspend payment, have been injured by speculations

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beyond the legitimate line of their trade, but their failure is equally certain, and the rights of all classes of their creditors are the same as if they had continued to deal in the course most familiar to them. One of the judges has intimated, though it was not necessary for him to decide; that accommodation paper might perhaps be excluded by the word *his* of the statute. But upon further reflection I think it would appear to him, as it does to me, that *his* commercial paper, as applied to one proceeded against in bankruptcy, merely means paper which *he* is bound to pay, without reference to its origin. If a banker, &c., has indorsed a note, the indorsement is *his*; and if he has received due notice of dishonor, *he* is liable to pay the note; and if he has thereafter failed to pay it the failure is *his*; and this although some one else, who was bound to save him harmless, has failed to do so, and thus has broken two promises, while the indorser has broken but one. The one is sufficient to establish his failure to meet his obligations.

I must therefore hold that the act of bankruptcy alleged in the petition is proved. It is a great satisfaction to me to know that this decision can be reviewed in the circuit court, and I hope the respondent will take the necessary steps to that end. A recent rule of the circuit court points out the time and manner of applying to the general supervisory power of that court.

Petition sustained. Defendant adjudged bankrupt. Warrant not to issue for ten days unless appeal is waived.

H. D. Hyde, for the petitioner.

G. S. Hillard, for the respondent.

MAURICE CAIN v. J. F. D. GARFIELD & AL.

OCTOBER, 1870.

A bill of lading recited that the vessel was bound to a certain wharf in Charlestown, and undertook to deliver safely at the aforesaid port of Charlestown. *Held*, that the contract was to deliver at that particular wharf.

The lay-days under the above-mentioned bill of lading were to begin in twenty-four hours after arrival at the port and notice to the consignee. *Held*, the vessel had not arrived until she reached the wharf mentioned in the contract.

A tender admits the cause of action in admiralty as at law.

LIBEL FOR DEMURRAGE. — The cause was submitted to the court on a case stated. The libellant as master and charterer of the schooner *Thomas Clyde* took on board the vessel at Philadelphia a cargo of coal, to be delivered to the respondents. The bill of lading recited that the schooner was bound to "Charlestown, Fitchburg R. R. Wharf," and undertook to deliver the coal at the aforesaid port of Charlestown. Across its face was written that the shipment was subject to the demurrage clause of the captains' and vessel-owners' association. The parties agreed that the reference was to a clause lately adopted in the coal trade, which is printed in the case of *The Boston*, *supra*, p. 464. The schooner arrived at Charles River Bridge in Charlestown at a certain time, and the master gave the defendants notice of his arrival, and they required him to go to the Fitchburg Railroad Wharf, which is higher up the river. From the intervention of a Sunday and some accidents of navigation, it became important to the parties to ascertain whether the lay-days began to run in twenty-four hours after the notice, or after the arrival of the vessel at the wharf, and this suit was brought to test the question.

The respondents tendered the amount which would be due on the latter theory.

J. W. Hudson, for the libellant.

H. C. Hutchins & H. H. Currier, for the respondents.

LOWELL, J. The general rule is that the lay-days begin to run on the arrival of the vessel at the entrance of her dock or other place of discharge, and not when she has merely reached the port of delivery: *Kell v. Anderson*, 10 M. & W. 498; *Parker v. Winlow*, 7 Ellis & B. 942. The bill of lading now in use in the coal trade varies this rule. It was adopted for the purpose of requiring consignees to find a wharf and notify the master, and it perhaps assumes that the vessel can reach the wharf within a day after notice given. In this case notice by the master of his arrival, and by the consignee of the wharf, would seem to be unnecessary, because the wharf is designated in the contract itself, and the arrival there might be presumed to be known to the consignee. In the form in which the parties have made the contract, its construction seems to me to be, that, accidents excepted, the master was bound to deliver, and the consignee to receive, the cargo at the Fitchburg

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Railroad Wharf, and that the master could not force on his lay-days by notifying his arrival within the limits of the port, when he might never reach his real destination, or not within the twenty-four hours. The notice by the master, as I have often decided (for this new form of bill of lading has given rise to a great deal of litigation), implies a readiness on his part to deliver so soon as the place of delivery shall be pointed out to him. Here he already knew the wharf, and his freight would not be earned until he arrived there. It is not often that lay-days can begin before the carriage of the goods is ended. Whether, under the contract, in the absence of an agreement to go to a particular wharf, the freight is earned on arrival at the port and notice thereof, or in twenty-four hours thereafter; whether the vessel or the shipper takes the risk of unavoidable delays after that time, are questions that I have not yet had occasion to answer. In this case I hold the contract to mean that the schooner must go to the wharf mentioned therein before the master can truly say that he has arrived.

I am asked to go farther and refuse all demurrage, on the ground that no valid notice was ever given. This I cannot do for two reasons. 1. Because the notice which was given appears to have been acted on as sufficient except in point of time. 2. Because the tender admits a liability, and the whole case has proceeded on the idea that something is due.

Decree for the libellant for the sum tendered, without costs; for the respondents, for their costs.

THE BLACKSTONE.

NOVEMBER, 1870.

In a collision cause, experts may testify concerning the bearing of a steamer's rate of speed upon her navigation, such as the facility of steering, &c., but not to the prudence or propriety of keeping up a high rate of speed in a fog.

A steamer was running at her usual speed of more than eight knots in a dense fog in the South Vineyard channel, and too fast to avoid a schooner after she was seen; held, the steamer was not going at a moderate speed as required by the statute.

A schooner was held not to be in fault for tacking and running back on her course in a dense fog, though a collision with a steamer took place which would not other-

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wise have happened, it being proved that the collision was not a necessary or probable consequence of the act, the schooner being more than four miles from the steamer when the change of course was made.

The schooner having the general duty to keep her course after the steamer was discovered; *held*, she was in no fault for doing so, when she heard no hail from the steamer to change it, it not being entirely and unmistakably certain that a change would be calculated to aid the steamer to avoid the collision.

COLLISION. — The schooner S. H. Woodbury, coal laden, came in collision with the large screw steamer Blackstone of the Merchants Line, between Boston and New York, and was sunk and totally lost, at about two o'clock in the afternoon of the twenty-ninth of July last. The vessels were both bound towards Boston, and were passing through the passage called in the answer the South Vineyard channel, approaching the Cross Rip light-ship from the direction of Martha's Vineyard, the schooner going with a fair wind nearly as fast as the steamer and about four miles ahead of her, when the schooner ran into a bank of fog, and her master thought it more prudent to come to anchor, and for this purpose he tacked and stood back on the wind, close hauled on the port tack, intending to beat up to one side of the channel and come to anchor. After running so for some minutes he heard the whistle of the steamer, and immediately ordered his fog-horn to be sounded, which was done several times. After a few minutes more the steamer was seen, and was hailed to keep out of the way, but did not appear to change her course, and ran into the schooner near her bows, cutting her down and sinking her almost instantly. The crew had time to get into their own boat, and were picked up by the steamer. On the part of the steamer, the evidence was that when the fog shut in, the master clewed up his gaff-topsail, leaving the foresail, staysail, and jib set upon the foremast, placed the second mate and two men upon the watch, and sounded the steam-whistle at short intervals. He had seen only two vessels ahead of him, one of which was this schooner, and both were going in the same direction with his own vessel. He continued in the same course and at about the same speed as before, a speed which witnesses on both sides estimated at about eight knots an hour, against a tide of two or two and a half knots. To support this estimate it was proved that the Blackstone is a heavy boat, slow for her size, with small engines, and that she had a kind of coal which was not

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well suited to her boilers. On the other hand, the libellants showed from Captain Loveland's log-book that he had passed certain points on the Vineyard at certain times, from which the computation was made that he was going more than eight knots over the ground, and therefore nearly or quite eleven knots through the water.

J. C. Dodge, for the libellants.

D. Thaxter & F. Bartlett, for the claimants.

LOWELL, J. Every steamer is required by the statute to go at a moderate speed in a fog, and the only real dispute on this part of the case is, whether this requirement was followed. For it is not denied that after the schooner was discovered, every thing was done that could be done, and with all diligence, to avoid her, and to stop and back the steamer; and that it was then impossible to prevent the catastrophe. Nor is the sufficiency of the lookout brought into question. I refused to receive the opinions of experts upon the prudence of the master in keeping his steamer at this speed, excepting so far as any question of navigation, such as convenience of steering, &c., was concerned, because, when all the facts are shown, and their bearing upon navigation is explained, the question whether the speed was moderate, whether called fact or law, is not one of nautical skill at all, but of sound judgment, which the expert is no more competent to speak to than any one else.

The argument for the steamer is, that there was no occasion to slacken her speed, because the fog appeared to be local, a small bank which would soon be passed, and that her officers could see, before it covered them, that there was nothing in the way for several miles; that they had a right to expect the schooner to keep her course, and that if she had done so, there would have been no collision. Besides this, they offered evidence tending to show that the vessels were so near when the horn was first heard, that nothing could have saved the schooner, however slowly the steamer might have been moving. And this evidence was not contradicted. The moderate speed which the statute prescribes is thus spoken of by Judge Shepley, in giving the opinion of the circuit court in the late case of *The Monticello*. The term, he says, "is not capable of any definition which would apply to a speed of any given

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number of miles an hour alike under all circumstances. What would be a moderate speed in the open sea, would not be allowable in a crowded thoroughfare or in a narrow channel. And under the same circumstances in other respects, the speed should be the more moderate according as the fog is more dense. The only rule to be extracted from the statute and a comparison of the decided cases is, that the duty of going at a moderate speed in a fog, requires a speed sufficiently moderate to enable the steamer, under ordinary circumstances, seasonably, usefully, and effectually to do the three things required of her in the same clause of the statute, viz., to slacken her speed, or, if necessary, to stop and reverse." And he cites, among others, the case of *The Batavia*, 9 Moore, P. C. 286, in which the court thought it unnecessary to ascertain the precise rate of speed of the steamer, the witnesses having stated it all the way from ten knots to one and a half, because, they said that any rate was too great that endangered other vessels in the river. There is another case in which the same learned body, the privy council, is said to have decided that if the steamer was navigated at a rate which made it impossible for her to avoid collision with a ship, "discovering it only at the distance at which alone it could be discovered, that it followed as an inevitable consequence that she was sailing at a rate of speed at which it was not lawful for her to navigate:" *The Europa*, 1 Pritch. Adm. Dig. 187. This seems to make the fact of the collision the conclusive test of negligence in all cases in which the sailing vessel is in no fault. It is not difficult to find cases in which various rates of speed have been held to be too great, in two of which the rate was from three and a half to five miles: *The A. Rossiter*, 1 Newb. 225; *The Robert and Ann*, Holt, Rule of the Road, 58; and in several it was less than the rate here; but each case must depend on its particular circumstances. The decisions only prove that there is scarcely any speed that has not been held to be too great upon some state of facts. The evidence is that the fog was very dense while it lasted, and that the channel is much frequented, so that the steamer was placed in the circumstances in which all the authorities require great caution and circumspection to be exercised. To break the force of these circumstances, it is said that neither the general character of the thoroughfare, nor

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the thickness of the fog imposed any special duty upon the steamer, because her master in fact saw that there was no danger to be apprehended in the channel at the time. This point meets us in both parts of the case, because it is set up as a fault in the libellants, and as an excuse for the claimants, that the schooner should have been put about in the midst of this fog, and have come back upon her former track. The collision is certainly an unfortunate result to have followed from a precaution intended to have a very different effect, but I cannot hold it to be a fault, because it was undertaken at such a distance from the steamer, that the collision or any danger of it, was not an obvious or probable consequence. The schooner was working out of the channel, and had got somewhat to the southward of the usual course of vessels; the master of the steamer says a few hundred yards, and other witnesses make it more. It is proved that she might have anchored, with good ground, on either side of the channel, and without putting back, but her master thought it more prudent to run back to the widest part of the channel. As this decision was taken when the steamer was some four miles off, I hold that the master of the schooner was free to change his course at that time without reference to the steamer. The master of the schooner had seen the steamer, but she was so distant that he was not sure which way she was going. If the schooner had the right to run back in the general direction in which the steamer was coming, she had the right to expect care on the part of the steamer, if they should happen to meet fifteen or twenty minutes afterwards. It is undoubtedly true that the master of the steamer was surprised to meet this particular schooner, as his first exclamation clearly showed. Still, in running through the channel at his usual speed, he took the risk of meeting this or any other vessel properly navigating these waters; and it is nothing to him whether the schooner turned back for a more or less valid reason, seeing that she did it under circumstances which ought to have made it reasonably safe. If she were putting back to port from absolute necessity the decision of this case ought to be the same as it should be under the existing circumstances.

I do not place much reliance upon the evidence, though not contradicted, that a slower speed would have made no difference. It

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was well suggested, at the argument, that it might, at least, have enabled the lookout to hear the fog-horn sooner, because the noise at the steamer's bow would have been less ; and it is by no means clear that it would not have enabled the steamer to avoid the libellant's vessel after she was seen. Even an expert must speak very cautiously to such a question, which involves a very close calculation of what a steamer can do in a given time, because no one is in the habit of timing them exactly, and a difference of a few seconds changes the whole aspect of the question. The statute undoubtedly assumes with a binding force which I have no right to resist, that a slow speed conduces to safety, and there is nothing in this case that should take it out of the rule, unless it be that the fog was unusually dense, or the steamer particularly difficult to manage ; in either of which cases, the necessity for caution was all the greater. I should be glad to see the experiment tried by a steamer, of moderating her speed in a fog, but I have hitherto found that their managers do not consider it to be important. If it is not, they should procure a change of the law. Notwithstanding sailing vessels are not specially mentioned in this connection in the statute, I suppose they are still bound by the general rules of navigation, and might, under some circumstances, be held to have carried too much sail in a fog. Such fault is not charged in this case ; but it is said the schooner should have luffed. Undoubtedly, if she had heard the hail, she might well have obeyed it, because the steamer could not then have objected, and the consequences might have been very useful. But her duty being to keep her course, I should be very slow to charge her with wrong in adhering to this rule, in the absence of orders from the steamer, although a wise audacity might have prompted a departure from it. The steamer was the master of the navigation, if I may so express it, and might go to port or to starboard, and though, under the particular circumstances, any competent seaman would perhaps have starboarded, yet if the schooner had changed her course upon the faith of this presumption, she could scarcely have been cleared of responsibility, if the steamer had ported, and the collision had occurred, unless the change had taken place so near the very moment of collision, that it seemed a precaution to lessen the shock rather than a manœuvre to avoid the collision altogether.

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At all events, she would have been put upon the defensive by her violation of the letter of the law. Upon the whole case, I find that the steamer disobeyed the law by going at her usual speed, which I believe to be nearer eleven knots than eight; and that the schooner was not in fault. *Decree for the libellants.*

THE PROMETHEUS. (Two cases.)

NOVEMBER, 1870.

A court of admiralty has no authority to decree the possession of a ship to her general owners on their libel, alleging that the charterers have failed to fulfil the contract on their part, the charter being one which gave possession and control of the ship to the charterers for a time certain, with no condition of forfeiture on a breach.

A court of admiralty may order a ship libelled for wages to be delivered to the general owners, if the charterers who are entitled to possession refuse to claim her.

LIBEL FOR POSSESSION. — **LOWELL, J.** The libellants were the general owners of this steamer, and chartered her to a corporation called the Washington and Boston Steamship Company, to run between Washington and Boston for a term of three months, for twelve hundred dollars a month, payable monthly in advance. The charterers, who had a right to buy the ship at the end of the charter, were to man, victual, and coal her, and to pay all expenses, to keep her insured for the benefit of the owners, and to give security that no bills should remain unpaid so as to become a lien upon the vessel. The libellants propound that this contract has been broken by the charterers in several particulars, and pray that the possession of the vessel may be decreed to them. I cannot enter such a decree, even on a default, because the libel shows no sufficient ground on which to rest it. By their contract, the libellants have seen fit to put all the power into the hands of the other party, and to trust to their agreement for indemnity. Not merely the right to use the vessel, but the entire control and possession are surrendered, with no clause for repossession on a breach, nor any words which express or imply a condition by non-performance of which the contract may be defeated. Whether the libellants did not care to be under the liabilities of ownership as to third persons, or for whatever other reason, it is clear that they

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have retained no hold upon the ship by a master or otherwise. In this state of the case I am not aware that any court, whether of law, equity, or admiralty, can intervene and save the parties from the plain consequences of their contract. No authority has been shown me, and I know of none justifying such action.

It is not the jurisdiction of this court, but the title of the promoters of this action that is wanting. *Libel dismissed.*

Another libel against the same vessel, filed a few days later, was soon after brought on and argued *ex parte*, in which the seamen proceeded for their wages, and the general owners of the ship intervened as claimants. It appeared in this cause that the wages were due and unpaid, and ought to have been paid by the charterers, who did not appear, and whose master formally relinquished possession to the owners.

LOWELL, J. In this cause, the general owners of the ship may have a warrant to receive the vessel on filing the usual stipulation to the action. The difference in their position in the two causes is, that when they were libellants they showed no right of possession as against the persons then named as special owners. Here it is shown that they are the owners, and that the charterers do not choose to intervene, but are quite willing the vessel should be sold for their debt. If the vessel were sold, it is clear the general owners would be entitled to the proceeds, and the court is not bound to put them to the expense and danger of loss which may accompany a sale. A vessel arrested by holders of maritime liens, may be delivered to any person showing a just title, although some one who is notified and does not choose to appear may have an equal or even better right to the immediate possession. It is to be observed, too, that the failure of the charterers to claim the vessel or to pay the wages, and the affidavits in the case show that they have in fact abandoned the vessel, while in the petitory suit, on the contrary, the allegation was that they wrongly refused to deliver up the vessel to the owners. Perhaps the truth may be that the charterers were quite ready to abandon the vessel, but could not agree upon terms of settlement with the owners. If the first libel had set up an abandonment, perhaps the evidence now adduced would have been sufficient to prove it. *Warrant to deliver granted.*

T. W. Clarke, for the general owners.

Re Dewey.

Re EDWARD DEWEY.

DECEMBER, 1870.

The bankrupt act, § 18, requires the court to exercise a judicial discretion in affirming or refusing to affirm the action of creditors in the removal of an assignee.

When it appeared that a majority of creditors in number and value had duly voted to remove the assignees, but that the creditors were few, and several of them voting for the removal were parties to mortgages and other transactions which the assignees were seeking to impeach, and that the whole movement was made by and on behalf of such parties, and no money remained in the hands of the assignees, and nothing remained to be done by them excepting to settle those disputes, the court refused to remove the assignees.

LOWELL, J. A majority in number and value of the creditors in this cause petitioned the court to appoint a meeting, as required by § 18, that a vote might be taken upon the removal of the assignees. At the meeting the requisite majority voted to remove them, and this action is reported to me for my consent. The statute which makes that consent necessary, and the form prescribed by the supreme court, which contemplates that the reason for removal should be stated in the petition, seem to require that I should exercise a judicial discretion in the matter, notwithstanding the action of the creditors.

The case shows that the bankrupt was a wholesale dealer in whiskey, and that at the time of his bankruptcy part of the goods which he had bought had been replevied by the sellers, the rest being in the hands of mortgagees or pledgees. The assignees have defended the replevin suit, and have brought suits in equity in this court against the mortgagees. In these last suits decrees were made by me, by the written consent of the parties, requiring the assignees to sell the whiskey at retail, for cash, and pay the money into court, and authorizing the mortgagees to have the money paid out to them, pending the litigation, on security for its repayment in case the final decree should be against them. All this has been done; and the payments to the mortgagees have absorbed all the proceeds. There are no assets in the estate, unless the assignees prevail either in the replevin suit or in one or both of the suits in this court.

The creditors allege that the assignees misconducted the sales of the whiskey, so that they failed to obtain as much as they might

Re George & al.

have got by about two thousand dollars. On the other hand, the assignees say that they are amply able to respond to any sum which they ought to pay, if any thing, in respect to the sales; and that the movement for their removal has been originated and conducted by and on behalf of the parties to the suits above mentioned. And there is nothing remaining in the hands or under the control of the assignees but the settlement of these suits. The evidence shows that these statements are true, and an examination of the vote of the eight creditors constituting the majority, taken in connection with the evidence, places the matter beyond doubt. I am always ready to hold assignees to a strict account, and shall do so in this case, but I hesitate to remove them in a case where such a course may operate the very opposite effect from what is intended by the law, and may be held as a precedent for punishing assignees for too great zeal in the conduct of their office. It is not alleged that the defendants are acting oppressively or in bad faith in the conduct of the suits, and I am unwilling to admit that the parties opposed in interest to the official action of assignees should have the power to dictate their conduct, even if they happen to be able to command a majority vote of the creditors themselves. It is not the intention of the law that the majority should have absolute control over the rights and interests of the minority. That the new assignee whom the creditors have chosen is a gentleman of high character does not meet this difficulty. The great danger is in the precedent of making the removal under the peculiar circumstances of this case. *Consent refused.*

H. D. Hyde, for the petitioners.

R. M. Morse, Jr., for the respondents.

Re J. H. GEORGE & AL.

1870.

The court will not usually award costs to the prevailing party on the issue of the bankrupt's discharge.

Semble, if the objections were frivolous or vexatious, or if, on the other hand, the bankrupt were shown to have the means of paying costs, a different order might be taken in this respect.

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LOWELL, J. Certain creditors objected to the discharge of these bankrupts, and the questions of fact arising thereon were submitted to a jury, who found some of the specifications to be true. The creditors now move for costs. I have not found any reference in the statute or the general orders to the costs of either party in what is often the vital and most closely contested issue in the cause, unless it be in section 28, where it is provided that all the costs of suits and the several proceedings in bankruptcy shall be a first lien on the assets. The costs here mentioned include all the usual and proper fees, whether in the ordinary conduct of the proceedings, or in suits which the assignee has properly brought or defended in the administration of his trust. But I have not held them to cover the costs of opposing the debtor's discharge, for this reason: The statute makes it no part of the assignee's duty or right to oppose the discharge of the bankrupt, but carefully regulates that matter as being one between such creditors as choose to act in the premises, and the debtor himself. The assignee cannot interfere unless he happens to be a creditor, and then only as creditor. It would seem, therefore, that for some reason, congress thought best to treat this question as one of private rather than general concern. Perhaps it was thought that some creditors might choose to give the bankrupt his certificate, notwithstanding any conduct by which he might have forfeited the right to it, and that they ought not to be charged with the expenses of an opposition which they do not wish to make. This view is quite consistent with that part of the law which gives any one or more of the creditors the right to oppose the discharge for cause, although a majority in number and value may have assented to its being granted. If, then, this is a sort of private suit between the debtors and those creditors who choose to object, should the prevailing party recover costs? I have found no statute of the United States which gives an absolute right to costs in a case of this kind; and I take it to be clear that the district court, sitting in bankruptcy, has the discretion, like other courts of equitable jurisdiction, to give or withhold costs, in whole or in part, as it may deem just, in all proceedings not specially regulated by statute. Such appears to have been the practice under the statute of 1841: *In re Guild*, 1 Woodb. &

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M. 29. Under the act of 1867 I have seen reports of cases in which the objections appear to have been overruled with costs, but I recall no case in which the point has been at all discussed, or in which costs have been given against the bankrupt. It seems to me that a sound judicial discretion prescribes that costs should not, in general, be given in these cases. The bankrupt is presumed to be poor, and in most cases would probably be unable to pay costs; and, on the other hand, as there ought to be mutuality in these things, I should not usually give costs against the objecting creditors. The exceptions, perhaps, should be where, on the one side, frivolous, unfounded, or clearly insufficient objections were made, which might justly be deemed vexatious; or, on the other, where the debtor appeared to be clearly in the wrong, and to have the means to pay the charge. Applying these rules to the present case we find that the specifications which were sustained by the jury are those which charge a preference to one creditor, and a failure to keep proper books of account. There was nothing to show actual fraud or concealment of property, and no reason to suppose that the defendants could now respond to the execution. Under these circumstances the creditors must be content with holding the original debt and interest good against the debtors. It will not be difficult for creditors to combine in such way that the expense to each will be comparatively slight. The greater hardship is when an honest debtor entitled to his certificate is opposed by his creditors. But even in that case I should not feel at liberty to vary the rule, excepting in such instances as I have suggested. He must come prepared to prove his right to relief, and to meet any objection that may be made in good faith and with probable cause. The contest would be too unequal if the parties were not to stand on a like footing in this respect. This case does not necessarily involve the point whether, under any circumstances, the costs, or any part of them, might, in the discretion of the court, be allowed out of the fund, though not within section 28; because here the fund is said to be insufficient.

Motion denied.

F. J. Lippitt, for the creditors.

E. Avery, for the bankrupts.

Ex parte Farnsworth. — Re Whitney & al.

Ex parte FARNSWORTH. — Re WHITNEY & AL.

1870.

A bankrupt firm owed A. \$5897 for which he held their note, and as collateral security, the notes of third persons indorsed by the bankrupts for about \$7000. These persons had failed. *Held*, A. might surrender the note of the bankrupts and prove on their indorsements of the collateral notes for the amount of the debt of the bankrupts to him, and might prove for the full amount against the promisors on the collateral notes, receiving in dividends not more than the whole debt due him from the bankrupts.

BANKRUPTCY. — The creditor Farnsworth offered for proof against the estate of Whitney & Crain, bankrupts, a debt of five thousand eight hundred and ninety-seven dollars. As security for this debt he held the note of the bankrupt firm, and collateral notes of third persons (business paper), indorsed to him by the firm before maturity for about seven thousand dollars, the makers of which collateral notes had now failed, and the paper was in his hands duly protested. The assignee objected that no proof could be made against the estate of these bankrupts until the collateral notes had been sold and the proceeds of sale credited; and that if sold, the indorsements of the bankrupt must be so changed that no recourse could be had against their estate, else the proof would be double.

W. P. Walley (*H. W. Paine* with him), for the creditor. We admit that by § 20 property pledged by the bankrupt to secure a creditor must be sold before the debt can be proved, but it ought to be sold as it is, and not under any restrictions. We have not found any American cases which decide the precise question raised here, namely, what are the rights of the creditor whose security is by notes or bills bearing the bankrupt's indorsement. In England it is well settled that the creditor may prove against both estates: *Ex parte Martin*, 2 Rose, 87; *Ex parte Reed*, 3 Dea. & Chitty, 481; *Ex parte Blozham*, 6 Ves. 449; *Ex parte Wildman*, 1 Atk. 109.

If it should be decided that a creditor who holds collateral paper indorsed by the bankrupt must sell it as unindorsed, a part of the security is lost; for if each party to the bill or note pays fifty per cent in dividends, the holder will get but seventy-five per cent, in

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all, by being obliged to deduct the value of one promise before he proves upon the other, while he has contracted for the credit of both.

B. F. Brooks, for the assignee, cited *Ex parte Burn*, 2 Rose, 55; *Ex parte Rufford*, 1 Glynn & J. 41.

LOWELL, J. The industry of the learned counsel on either side has failed to discover decisions under any bankrupt or insolvent law of this country directly in point, and both have resorted to the English cases. As I have often observed the cases in either country and especially in England must be used with great care, because our statute is more or less different from all the others, and more widely from the English than from some of the American statutes. At the same time it is impossible to understand our bankrupt act fully without some knowledge of the cases under those laws, because it has adopted into the body of the act, many doctrines originally founded only in decisions, though with very important modifications. The doctrine that a creditor who holds collateral security upon the property of the bankrupt must first realize his security and then prove for the balance, has been adopted from the courts of equity. It is found in section twenty of our bankrupt law where it is enacted that "when a creditor has a mortgage or pledge of the real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property to be ascertained by agreement between him and the assignee, or by a sale thereof to be made in such manner as the court may direct." It has been assumed by both parties that commercial paper of third persons, deposited by the bankrupt as security for a debt, is personal property within this clause, and I see no reason to question the correctness of that assumption. Such has always been the law of England where a rule of court early established the practice which is part of our statute. If, therefore, the petitioner held as security notes or bills of third persons without the bankrupt's indorsement, but pledged by them, it is agreed that he must sell them or give credit for their value, and prove for the balance only after deducting such value. But if the collateral notes or bills contain the indorsements of the bankrupt

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there is more difficulty. A sale of such notes would give the buyer a right to prove for the whole face of the paper, which is, in this instance, greater than the original debt, besides leaving to the present holder a right to prove for the deficiency, so that the other creditors would be put at a disadvantage by having a larger debt proved than the bankrupts owe to this petitioner. On the other hand if I order the creditor to restrict the indorsement so that the buyer cannot prove against Whitney & Crain, I am depriving the creditor of part of his security, for he holds the credit of both the parties to the bills for his whole debt, and by realizing on one of them first, and deducting what he obtains from him he loses a part of the credit of the other party.

These considerations show that the English doctrine, that if the bankrupt has indorsed the bills the holder may prove against both estates is sound, because then the creditor gets precisely the security he bargained for, and no one is injured. This rule has been long established by the court of chancery in England: *Ex parte Twogood*, 19 Ves. 229. It is understood, of course, that the proof against the bankrupts' estate can be only for the amount due from them to the creditor. They cannot by giving him a promise for more enable him to prove beyond the real debt, any more than he could, in any other court, obtain judgment for more. Against the promisors on the collateral notes he can prove for the full amount of the notes, because that was the very purpose of pledging them to him for a larger amount than his debt. But he can^o receive in dividends from both parties no more than his whole debt.

There is no technical difficulty in the way of this mode of dealing with the subject, because the creditor can surrender the note of the bankrupts and make his proof on the indorsements up to the amount of his debt against the bankrupt, and he will then have no security for his debt. This is strictly legal as well as equitable.

Proof to be admitted on the indorsements for \$5897 on surrender of the original note of the bankrupts.

Re The Eureka Manufacturing Co. — Re The Inventors' Manufacturing Co.

RE THE EUREKA MANUFACTURING CO. — RE THE INVENTORS' MANUFACTURING CO.

1870.

Where A. had fraudulently overdrawn his bank account by collusion with the cashier of the bank, and had given the checks to an incorporated manufacturing company of which he was the principal shareholder, and A. was always largely in advance to the company, and both A. and the company became bankrupt: *Held*, the bank could prove as a creditor directly against the company to the exclusion of the assignee of A.

BANKRUPTCY. — These manufacturing companies were duly organized as bodies corporate under the general statute of Massachusetts; they had their general place of business at Boston, and their factories in Connecticut, and became bankrupts in this judicial district. A. C. Felton, who was the principal stockholder, and president of both companies, is also a bankrupt, and the controversy here was whether his assignees could prove for a large balance of account against the estate of the respective companies, or whether proof could be made against them for a nearly equal amount by the National Hide & Leather Bank of Boston, to the exclusion of Felton's assignees. This was a very important question to the parties, because the companies were expected to pay a considerable dividend, which, in the one case would go to all Felton's creditors, and in the other to the bank only. The evidence tended to show that Felton in fact transacted most of the financial business of the manufacturing companies, and furnished them with the money they needed, usually by checks on the Hide & Leather Bank; but that he was not the treasurer, and the form of dealing between the parties was that Felton was credited with all moneys that he paid, and charged with all moneys which he received, and having paid out much more than he received, there was a large balance appearing to be due him on the books of each of the companies. Neither corporation kept any bank account, and Felton was in reality their banker. He had dealt with the Hide & Leather Bank for some years, beginning before these corporations were organized; and his pass-book was always in the name of A. C. Felton, Treasurer, and this form was adopted when he was treasurer of a mining company. The evi-

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dence did not show that the bank was ever notified or had reason to believe that the title treasurer, on his book, was intended to apply to either of these companies. Felton was in the habit of overdrawing his account at the bank, and the balance against him was constantly increasing, until, at the time of his failure it had reached the amount of at least three hundred thousand dollars, and probably much more. It could be proved that many of the checks drawn by Felton were for the use and benefit of the corporations respectively. Sometimes the checks were drawn by Felton, and the bank-notes were paid to the treasurer here or sent to the superintendent, or paid to the creditors; and in other instances the checks were paid directly to creditors, or sent by Felton or by the treasurer here, to the superintendents of the factories in Connecticut. In what way these last were collected by the superintendent was not explained in evidence. Martin, the cashier of the bank, was fully acquainted with the overdrafts; but it did not appear that any other officers of the bank or of the manufacturing companies, excepting Felton and Martin, had such knowledge.

LOWELL, J. I cannot presume, as it is argued that I should, that the cashier's action was approved by the bank, and that these enormous advances were made as an ordinary debt from Felton to the bank. Special authority must be proved for the action of the cashier so far beyond the limits of his ordinary duty and authority. Upon the face of the transaction it was a fraud on the bank.

The question then is whether the bank can follow the moneys into the hands of the companies, or must be content with holding the debt against Felton. And this is substantially the same question as would arise in an action of *assumpsit* between the same parties, if they had all remained solvent. The right to maintain an action for money had and received does not always depend on privity of contract, or upon contract at all. It is often sustainable on the same evidence that would support *trover* if chattels and not money were in question: *Neate v. Harding*, 6 Exch. 349; *Clark v. Shea*, Cowp. 200; *Mason v. Waite*, 17 Mass. 560. It is enough to prove that the defendant has money of the plaintiff, which in equity and good conscience he ought not to retain. Where, indeed, the defendant is bound by a valid contract (to

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which the plaintiff is not a party or privy) to pay the money to some one else, the plaintiff cannot prevail, not because privity of contract is essential to this form of action, but because it is essential to that particular case, which has its foundation in a valid contract; or, in other words, because the plaintiff, in that particular case, has failed to show, that, as between the parties, the money is equitably *his*. The law does not imply a contract to pay A., when the debtor is already bound by a valid contract to pay B. In cases not founded on a direct contract, the inquiry is, not concerning privity of contract, but concerning identity of property.

I have not thought it necessary to consider, in this case, whether Felton was so far the agent of the manufacturing companies that his fraud can be imputed to them, because it appears that his balance of account against each corporation is about equal to the amount of checks which the bank can prove were used for the benefit of the corporation. In this state of the accounts, I am of opinion that the bank can prove the amount of these checks against each company to the extent of its debt to Felton, without showing knowledge of the fraud. The reason is, that to this extent the corporations were not holders for value. All that they ever gave for these checks was an implied promise to repay the amount of them when able, and they never have repaid it, but have always been indebted to Felton by a constantly increasing balance of account. They cannot set up Felton's title to the checks, because that was fraudulent. Their obligation to pay him, must yield as soon as the fraud is shown. In this respect the case is analogous to an asserted title to a chattel derived through a thief. The only difference is, that in the case of money, the defendants may rely on any payment or set-off made or acquired without knowledge of the fraud: *Lime Rock Bank v. Plimpton*, 17 Pick. 159; *Watson v. Russell*, 3 Best & S. 40; but this defence is wanting here, as we have seen, to the extent of Felton's balance of account against the companies. Is there, then, such identity shown, such a tracing of the money, as will enable the bank to say that its money has come to the hands of the corporations respectively? I think there is. In those instances in which the officers of the corporation acting in its behalf, drew out the bank-bills upon the fraudu-

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lent checks, it is impossible to deny that the bank might instantly have reclaimed those bills, on discovering the fraud, and proving that the corporation gave no value for the checks. And the same result would follow whenever the proceeds of checks were traced to their possession, whether in the identical bills or not: *Allanson v. Atkinson*, 1 M. & Selw. 583; *Follett v. Hoppe*, 17 Law Journ. (N. S.) C. P. 76. And in the case of all checks paid directly to the treasurer or superintendent of the company, it would be presumed that they drew them or caused them to be drawn. In those instances in which the checks were paid directly to creditors of the manufacturing companies, it might be somewhat more difficult to say that the money of the bank had come to the hands of the companies themselves. Whether any of these checks are now traced and relied on in this offer of proof, I am not advised. This hearing was merely preliminary, to enable the parties to argue the questions of law; the accounts are now to be settled either by the parties or by an assessor, and when the details are found, my final order will be made, and either party aggrieved thereby can appeal. In settling that account, I should wish that discrimination should be made, if now practicable, between those checks which were paid to the creditors of the companies and to the companies themselves. I do not mean to say that the former cannot be proved; perhaps they may be on the ground that the checks being fraudulent, and the corporations having received full value for them, on the credit of the bank, the latter may allege that its money has gone directly to the corporations, or has been paid to their use.

Order, that it be referred to the register to ascertain the amounts due from each of the corporations respectively upon the basis of this opinion. The claim of Felton's assignee is suspended until the above-mentioned accounts are taken. Either party may apply for further directions at any time.

G. O. Shattuck, for the bank.

A. A. Ranney & N. Morse, for the assignees of Felton.

The Workman.

THE WORKMAN.


1870.

A tug in towing a ship brought her against a wharf; *held*, that the tug was liable in damages, although the ship was rotten and unseaworthy, unless the condition of the vessel was the sole cause of the injury.

The damages in such a case are the natural and necessary consequences of the collision to the vessel in her actual state of repair.

COLLISION.—The steam-tug *Workman* was hired to tow the bark *White Wing* from Fiske's wharf in Boston into the stream, and farther if required. The master of the tug made his boat fast to the port side of the ship, ordered the lines of the latter to be cast off, and steamed ahead. Presently the starboard side of the bark's stern came in contact with the wharf, but was soon cleared, and after they had proceeded a short distance it was found that the stern of the vessel had come off. The master of the tug had the control and charge of the navigation of both vessels. Several of the timbers of the stern were rotten; and a very considerable proportion of the repairs put on the vessel would not have been necessary but for this state of her works.

LOWELL, J. The libellant contends, that however rotten his ship may have been, the tug had no right to hit her against the wharf, and is justly responsible for the natural consequences of the act. On the other part, this general proposition is not denied; but it is maintained that the state of the timbers was the sole cause of the damage, and the blow only such a slight touch as every vessel is liable to receive in coming to or going from her wharf, and that no negligence therefore can be argued from the result, and that none has been proved. That the mere act itself had no naturally injurious consequences. The vessel was not old, and had been taken good care of, but dry rot had attacked her stern, without the knowledge of the owner. The unexpected discovery of her actual state was said by one of the witnesses to be a very fortunate circumstance for her owner, because it may probably have saved her from a worse disaster. It seems clear that the bark was not sound, staunch, and seaworthy, as alleged by the libellant, and if this is a material and traversable averment it must be found against him.



The Workman.

But there is no warranty of seaworthiness in a contract of towage, and the claimants cannot prevail upon this point taken by itself, unless the evidence shall go the full length of showing that the whole damage was due to the state of the vessel. As, for instance, in any ordinary cause of collision, it would be immaterial that the injured vessel was insufficiently manned, or in any other respect unseaworthy, or even badly navigated, unless the defect caused or contributed to the disaster. Still less if a vessel were run into, would it be a defence that a stronger vessel would not have been injured. The undisputed fact that the tow was brought against the wharf with greater or less violence, calls upon the tug for an explanation. The explanation given is, that the motion of the vessels was very slow and the blow very slight, such as ought not to injure a seaworthy vessel. The difficulty I have found with this defence is, that it does not account for the blow itself. If it were shown that by the usual and necessary course of navigation a vessel must be expected to touch the ground or any other object at a certain point, a tug-boat could not be held to guarantee her against touching there. And, of course, any sudden squall or other accident may be shown. But there is nothing of the sort shown here under either alternative. It is said that vessels often touch the wharf, but not that they usually strike it as this vessel did. She was swung round in such a way as to bring her stern against some part of the wharf, and although the evidence is conflicting concerning the respective parts of vessel and wharf that were struck and the force of the blow, I am not satisfied that it was a mere touch, to be overlooked as being one of the ordinary and necessary incidents of towage, like wear and tear. It is a hard case, undoubtedly, because it will be very difficult to draw a perfectly just and equitable line in the award of damages. I shall endeavor to do this as far as possible. My decision at present merely is, that I cannot deprive the libellant entirely of damages, because I cannot be assured that the fault is wholly to be found in the defective character of his vessel.

Interlocutory decree for libellant. Damages to be assessed.

T. H. Russell, for the libellant.

J. C. Dodge, for the respondent.

Ex parte Mendell. — Re Butler.

Ex parte W. H. MENDELL. — Re BERZALDA BUTLER.

1870.

One who lends money to a retail trader within four months of his bankruptcy, and when he was actually insolvent, on a mortgage of his stock in trade, is bound to make some inquiry into his object in raising the money ; and if upon the slightest inquiry he could have discovered that the whole purpose was to prefer a creditor, his mortgage may be avoided by the assignee.

Clauses one and two of the thirty-fifth section of the bankrupt act considered.

A mortgage given to raise money to pay a creditor by way of preference comes within clause two of section thirty-five.

BANKRUPTCY.—The stock of goods which came to the possession of the assignee was mortgaged to the petitioner, and by order of court the stock was sold at auction, and the money was paid into the registry subject to all lawful liens. The mortgagee petitioned to have it paid out to him, and the assignee opposed the petition, on the ground that the mortgage was voidable by him under the second clause of the thirty-fifth section of the bankrupt act.

The evidence tended to show that Butler was a retail trader, having a shop on Tremont street, Boston, and one at North Cambridge ; that his stock in the latter place was mortgaged in May, 1870, but under what circumstances was not shown at this hearing ; that towards the end of June, if not earlier, he found difficulty in meeting his engagements, and some creditors did not obtain prompt payment of their accounts. He was owing one Cushman a balance of about fifteen hundred and eighty-six dollars, on a note which had been given for a stock of goods in April, 1868, and on which he had made many small payments, from time to time. Mr. Cushman asked him for another payment, and he said that he could not make it unless he borrowed the money. Kimball, a clerk or partner of Mr. Cushman, then suggested to Mendell, the now petitioner, that he might invest his money to advantage in a mortgage of Butler's stock, and to Butler that the petitioner would probably lend him the money. He brought the parties together, and the petitioner agreed to lend him \$1600. The transaction was concluded, and the money advanced in Cushman's place of business, and Kimball, the clerk or partner, lent

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the petitioner \$600 to make up the sum. The money was paid over by the bankrupt to Cushman in settlement of the old note, but it was not proved that this was done in presence of the mortgagee, or that he was, in fact, fully informed of the nature of the transaction. He made no inquiry into the condition of the mortgagor's affairs, but relied mainly as to security on the advice of Mr. Cushman and Mr. Kimball. Butler asked him to keep the mortgage off the record, because it would injure his credit, and he agreed that he would not record it at once, and so instructed Mr. Kimball, with whom he left the note and mortgage. The stock in trade of Butler was attached about two weeks after, and so remained until he went into bankruptcy on the 26th of August, 1870.

LOWELL, J. It is plain that the money was raised for the express purpose of paying a pre-existing debt, and the intent to prefer the creditor may be fairly inferred. The only doubt is, whether the mortgagee was a party to the fraud upon the statute, or was kept in the dark by his friends. There is evidence from which it may be argued that he must have understood the scheme, unless he were wilfully blind; but the assignee relies more particularly upon the second clause of the thirty-fifth section of the statute, as imposing such knowledge upon him by operation of law, unless he made diligent inquiry. It is strenuously urged, in opposition to this view, that the clause in question does not refer to mortgages at all, nor to preferences, whether direct or indirect, but only to sales out of the ordinary course of business of a trader.

Clauses one and two of section thirty-five are copied from the general statutes of Massachusetts, ch. 118, sections 89 and 91, with this important difference, that in both those sections the limitation was six months, whereas in clause one of the bankrupt act, relating more particularly to preferences, it is four months. Under the State statute the second clause was held to apply to preferences equally with the first: *Metcalf v. Munson*, 10 Allen, 491; *Nary v. Merrill*, 8 Allen, 451. And it is plain that the language of the second clause, taken by itself, does fairly include preferences, excepting such as are made by payments of money. But under the bankrupt act, the tendency of opinion has been that the difference in limitation shows an intention to put preferences

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on a different ground from other technical frauds. For instance, in a late case it was held in an action by an assignee to recover back money paid by the bankrupt to a pre-existing creditor, that the declaration was bad for alleging the payment to have been made within six months instead of four months before the bankruptcy: *Bean v. Brookmire*, 4 B. R. 57. I hold it still open to argument whether the thirty-ninth section does not substitute six months as the limitation in all cases, repealing to that extent the thirty-fifth section. In the case just cited, it appears to have been argued that the thirty-ninth section abolished all limitation; this argument was very properly overruled. But it may be said with a good deal of plausibility, that when congress in the thirty-ninth section made a preference an act of bankruptcy and proceeded to say, that if it was made the foundation of a petition within six months, the debtor might be adjudged a bankrupt, and if he were, the assignee might recover the money or other property, they were establishing a general rule, by means of a special example, and that that rule is, that preferences within six months may be avoided by the assignee. If so, this section, to that extent, repeals the earlier section. This is a view that has lately occurred to me, and in which I reserve my final opinion. If this construction should be ultimately adopted it will certainly reconcile some apparent discrepancies, and remove some apparent difficulties.

The precise point of this case is, whether a person advancing his own money to a trader, and taking security from him, out of the ordinary course of the trader's business, is to be held liable to reconvey the security, if the only fraud intended by the debtor is the payment of a creditor by way of preference. In Massachusetts it was held in the affirmative: *Crafts v. Belden*, 99 Mass. 535. But, as we have already seen, the statute of that State made no distinction between preferences and other technical frauds. Here the argument is, that if the creditor himself, who has received the preference, cannot be pursued after four months, it is very hard that one who is merely aiding him to obtain his money should be liable for two months longer. I feel the force of this objection, but the language of the act plainly includes this case, and it does not seem to come within the first clause, which contemplates that the money or property coming from the debtor

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should be applied by the person receiving it to the payment or security of the creditor. A transaction of the kind now in question is one step farther from the preference and fully within the second clause. In fact this mortgage was given within the four months, so that if it came within the first clause, the assignee would be entitled to recover, but it seems to me that it does not, and the assignee would be without remedy if it were not for the second clause. And I cannot believe the statute is so defective.

Taking this to be so, it is clear that the mortgage was out of the ordinary course of business of Mr. Butler, because he was a retail trader, doing a business of about one hundred dollars a day, and a mortgage of such a trader's whole stock is a confession of insolvency: *Nary v. Merrill*, 8 Allen, 451. If made directly to the creditor, it would have been an act of bankruptcy, as I have often decided. And both parties considered it injurious to his credit, and for that reason agreed that it should not be recorded until some necessity should arise therefor.

The petition of the mortgagee must for these reasons be dismissed. I here desire to express my preference that such cases should be brought in the form of actions at law, that a jury may decide the facts. Here the evidence tends very strongly to show that a creditor was preferred. If the creditor himself were innocent, but the debtor and mortgagee contrived the preference, the latter would be liable, though the creditor would not be: *Crafts v. Belden*, 99 Mass. 535. But in this case it is possible that the mortgagee was hoodwinked by the others, though the *prima facie* evidence is against him, and is not met, and I do not believe the truth to be so. Supposing, however, that he was not aware of the exact nature of the transaction, the assignee could certainly recover of the creditor, who is the party benefited, and justice would seem to require that he should be the person to repay the money. If, then, the mortgagee should apply to me to direct the assignee to bring an action against the creditor, on some proper terms, I should probably make such an order.

Petition dismissed. Money to remain in court for ten days unless the mortgagee waives his right to apply to the circuit court for a revision of this decree.

L. W. Howes, for the mortgagee.

T. F. Nutter, for the assignee.

Re Goodfellow.

Re GOODFELLOW.

1870.

An alien residing in the United States may be adjudged a bankrupt on his own petition.

Such an alien, owing debts here, may petition as soon as his residence is acquired.


An adjudication of bankruptcy upon a voluntary petition is a conclusive finding that the petitioner is insolvent and owes more than three hundred dollars, but not that he is within the jurisdiction of the court in other respects.

It seems, that an alien debtor who, when residing abroad, has made conveyances which would be preferences under our bankrupt law, and then within six months comes to the United States and goes into bankruptcy, is not entitled to his discharge.

If such a debtor has made conveyances at his home, in New Brunswick, which are fraudulent at common law, and on a secret trust for himself, he cannot have his discharge in bankruptcy here.

LOWELL, J. Joseph Goodfellow, the bankrupt, was born in the province of New Brunswick, and he resided there until last December. In 1868, he became a partner with one Stone, whose domicile was in New Hampshire, in a trade between the British provinces and Boston, and the firm owe debts here. In December, the bankrupt was arrested in Boston, and gave a recognizance, according to the law of the State, to appear before a magistrate within a certain time, and take the oath for the relief of poor debtors. He afterwards applied to take the oath, and pending the hearing thereon petitioned this court, on the 5th of January, to be adjudged a bankrupt, alleging that he resided in Boston, and had carried on business there for fourteen months next preceding the date of his petition. He was duly adjudged a bankrupt accordingly, but the first meeting has not been called, nor has an assignee been appointed. The creditor at whose suit he was arrested now petitions that the proceedings may be vacated for want of jurisdiction, alleging the debtor to be a non-resident alien.

The point is taken on behalf of the bankrupt that the adjudication itself is a conclusive finding of all the facts necessary to support it. No doubt the petition is conclusive evidence that the debtor is insolvent and desires to take the benefit of the act, and perhaps the fact that he owes \$300 may be conclusively found by the adjudication; but upon a fact which goes to defeat the jurisdiction



Re Goodfellow.

of the court over the supposed bankrupt, it cannot be so. Such a fact as that may be shown by plea and proof in any court by a person not estopped to show it, and it cannot be that the only exception is of the court in which the void proceedings themselves are pending. Nor is the adjudication binding as a judicial decree, which must be impeached, if at all, in a higher court. It is made *ex parte*, without notice to creditors, and is entirely under the control of this court, upon due proof that it ought to be annulled, at least in this stage of the cause.

The decision, then, depends upon the soundness in fact and in law of the petitioner's objections to the bankrupt's right to apply to this court, which are, that he is not a resident of Boston, and if he is, that he has not been so for six months, and in either case is not within the statute.

Section eleven makes every person residing within the jurisdiction of the United States who owes a certain amount of debts subject to the act, and it is not denied that resident aliens are here included: *Judd v. Lawrence*, 1 Cush. 531. If confirmation were needed, it is found in the latter part of the same section, which prescribes a special form of oath for citizens of the United States; clearly showing that some others than citizens are capable of being petitioners. But it is said that an alien must have resided for six months within the district before he can apply to the court. If the requirement were unqualified that the application must be in the district wherein the debtor has resided for the six months next before the filing of his petition, it might be a necessary inference, though one which would lead to most unfortunate consequences, that a debtor who had changed his residence within six months could not apply at all, notwithstanding the previous words, which include all persons residing within the jurisdiction of the United States. But the qualification is not absolute, it is for the six months, "or for the longest period during such six months," and the meaning is plain that, if the debtor has changed his residence within the United States during the six months, he must apply in that district in which his residence has during that time been the longest. And if he has had but one residence within the United States of less than six months, his application in the district where he resides is made in the district in which he has resided the

Re Goodfellow.

longest, though it be made on the day after his residence was established. As if a citizen of the United States residing abroad, but trading here, returns to his native domicile and files his petition immediately. Or in the case before Judge Blatchford, where a firm had carried on business in New York for only two months out of the six: *Re Foster et al.*, 3 B. R. 57. If, then, a person resides within the United States, and no district can be shown in which he has had a longer residence (within six months) than that in which he petitions, he has chosen the proper district.

I assume, for the purposes of this case, as the construction least favorable to the jurisdiction I am upholding, that the residence mentioned in the first part of section twelve is equivalent to domicile, which was its meaning under the insolvent law of Massachusetts: *McDaniel v. King*, 5 Cush. 469; and that an alien who has never lived here at all, though he may have traded here through agents, could not be made bankrupt here even if he might happen to be temporarily within the jurisdiction. The law is otherwise in England, because strangers or aliens have been included in terms, in all their statutes of bankruptcy since that of James I. But our statute has followed that of Massachusetts in this respect, though in the matter of this six months, or longest period, it is based on that of England. But it is not necessary to pass upon this point, nor to inquire whether any residence short of the acquisition of a domicile would under any circumstances, fall within the act, because, upon the evidence, which comes wholly from the debtor himself, who was examined orally before me, and which I have carefully considered, but need not recapitulate, I feel bound to hold that he was domiciled here on the 5th of January.

The creditor's petition is dismissed, and the cause will proceed before the register.

I. Knowles, Jr., for the creditor.

C. A. F. Swan, for the bankrupt.

The case was afterwards brought on again in 1870 upon specifications, filed by the same creditor, in opposition to the bankrupt's discharge; and there was evidence tending to show that he gave preferences to certain creditors in New Brunswick while he lived there, within six months of his petition to the court here, and that

Re Goodfellow.

he had made a deed of a farm to his brother-in-law to delay, hinder, and defraud creditors generally.

LOWELL, J. It has been argued in behalf of the bankrupt, that granting the preferences to have been made, and to be within the period contemplated by the statute, still they were made while he was a resident of the province, not subject to our law and not contemplating bankruptcy under it, and that in such a case the law cannot affect him ; and as it is not shown that the acts were illegal when and where they were done, they must be presumed to have been legal, and if so, they are good wherever they may be sought to be impeached. There is much force in this argument, and, indeed, it would be irresistible if the question were of the title to the goods or money conveyed in preference, or of any criminal responsibility ; but the question here is, whether a person who applies to be discharged from his debts must not show that he has complied with the conditions imposed by law, even although he was not aware of them and was not subject to the law when he did the acts. Congress has an undoubted right to annex such conditions as it chooses to the grant of a discharge. It might enact, for instance, that certain things done before the passage of the act should be ground for refusing it. And this seems to me an analogous case. The statute says : " You shall not be released if you have given certain preferences." Now, preferences are not necessarily illegal ; they are the payment of just debts. It depends altogether upon the fact of subsequent bankruptcy within a certain time whether they turn out to be legal or not. The fact that the transaction is legitimate between the parties and even against all the world is not important, if the intent existed in the mind of the debtor. The act requires an equal distribution of the estate, and if this fails through the act of the debtor, as, for instance, if he have lost a part of it in gaming, the discharge is not granted. It is not a punishment ; it is not retroactive. It is simply a condition precedent. Were this otherwise, creditors might be treated very unequally and unjustly, and yet lose all remedy. Let us suppose a non-resident alien trading with this country. If there is any bankrupt law in his own country, he must divide all his estate equally among his foreign as well as his domestic creditors ; for that is the main feature of all bankrupt laws throughout the

Re Goodfellow.

civilized world. If he does this he obtains a discharge, which is good throughout the world, according to the better opinion. I am not now speaking of a discharge by the authority of one State of this Union, which is limited by the federal constitution. Speaking generally, the discharge is good everywhere, and all creditors are treated alike. But suppose there is no bankrupt law. By the common law, a debtor may prefer any one or more creditors, and he naturally favors those at home, but he gets no binding discharge from all his debts. Then he comes here, and says, I have divided my property as I chose, in the absence of a bankrupt law at my former residence, and now I will obtain the advantages of your bankrupt law without its disadvantages, and thus obtain the benefit of both jurisdictions. I have referred to such a case, which appears to be much like the present one, in order to show my view of the intent of congress, and the reasons for it. If the estate of the debtor has been disposed of in accordance with the statute, a discharge shall be granted ; otherwise, not. It may be said to be a great hardship that a foreign merchant should be required to conform to laws that he knows nothing of, as, for instance, to keep books of account, which the laws of his own country do not require him to keep. The answer is, that in coming here for the benefits of a discharge from his debts he adopts the law, and must take it as he finds it. Indeed, it is not easy to see any distinction between citizens and aliens in this respect. A citizen who owns property and carries on business in other countries, cannot do acts which are perfectly lawful there, and still obtain the benefits of our statute, if the acts are such as will be a bar to the discharge.

I do not, however, find it necessary to pass conclusively upon this question of preference, because the evidence shows a conveyance of a farm by the bankrupt to his brother-in-law under very suspicious circumstances ; not as a preference, but for purposes of concealment. It is testified that the deed was made at a time and under circumstances when it is most probable it was intended to save it from being taken on execution. The explanation of the debtor is not satisfactory. He says he gave the deed merely as security for certain liabilities ; but it is proved that they had already been secured. Taking all the facts and circumstances it seems to be made out by the weight of the testimony that this

The Hermon.

conveyance was in fraud of creditors generally. I cannot assume that such an act is lawful anywhere. And if it were, still the petitioner could not be discharged, because the presumption is that he has still a subsisting interest in the farm which he has not procured to be surrendered to his assignee. *Discharge refused.*

I. Knowles, Jr., for the opposing creditor.

C. P. Hinds, for the bankrupt.

THE HERMON.

1870.

Seamen who were paid their wages in full in a foreign port and demanded their discharge there, but were refused it by the master and by the consul, and left the ship with the connivance of the master, were allowed by the court the two months' extra wages, though the case appeared to be one in which the consul might properly have remitted it; the men not having had the choice presented to them.

It seems, that bread carried in a locker which is in a well-built house on deck, is not stowed under deck as required by the act of 1790.

Where an insufficient quantity of bread was provided for a foreign voyage, the crew are entitled to the extra wages if put on short allowance, though the immediate cause of the deficiency was the spoiling of part of the bread by sea peril.

It seems, that flour cooked into good bread by the ship's cook, and served out in that form may be a substitute for ship-bread, though flour served out to the men would not be.

Where the crew had the full navy ration of meat, and a short allowance of bread and of other articles, like beans, rice, &c., they were held entitled to but one extra day's pay for each day's short allowance.

A foreigner shipped at a foreign port, and discharged at a foreign port in accordance with his contract, is not entitled to two months' extra pay.

A settlement deliberately made by a seaman with the advice of his proctor will not be opened.

WAGES.—The libellants demanded a balance of their contract wages for the voyage from Baltimore to Acapulco, thence to Callao, the Chincha Islands, Gibraltar, and Valencia; two months' wages for their discharge at Valencia, and a very large sum for alleged short allowance of bread and meat during a considerable part of the fifteen months of the voyage. The answer averred that the men were paid in full at Valencia, and that each signed a receipt which was read by or to him and understood; that they afterwards deserted the ship, and so forfeited the two months'

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wages ; that although there was short allowance for a few weeks, ending at Gibraltar, this was caused by a disaster, and was not in either bread or meat, but only in peas, beans, and rice.

The first question was whether the contract wages were paid in full at Valencia. Here, and throughout, there was an irreconcilable contradiction between the witnesses. The master promised to pay the men, and he produced their receipts in full. He and the mate swore that the crew were called separately into the cabin, and that their accounts were explained to them and the balances paid in gold or its equivalent, in some cases after discussion of items. Each man swore to the sum which he received, which in no single instance agreed with the receipt and with the master's statement. The judge found as matter of fact that the men had been paid in full at Valencia, and that the articles were ambiguous in their description of the voyage, so that it might well be a question whether it ended at Valencia, and continued : —

LOWELL, J. The next question is whether the men were entitled to two months' extra wages. It is said that the statutes of 1803, 1840, and 1856, taken together, admit of no other construction than that men who are discharged in a foreign port must have the statute compensation, even though the voyage, by its terms, ends in that port, unless the consul remits the payment in certain contingencies. This is a point of some nicety. The ninth clause of the act of 1840 gives the consul power to remit the extra pay if the seamen insist on their discharge and the master is in no fault. The present case seems to be one eminently fit for such action on the consul's part, because the seamen insisted that the voyage was ended, thus bringing themselves directly within section nine of the act of 1840, and I regret that it was not taken. Instead of this the master appears to have devised a fictitious desertion. It is plain that the desertion was planned beforehand with the master's consent, because he never would pay his men in full and let them all go on shore if he expected to reclaim them. Under these peculiar circumstances, I ought to give the men the two months' wages, because for some reason or other the master failed to get the consul's consent to their remission, and his defence of a desertion utterly fails. Perhaps I could remit the wages, though the consul had not been called on, in some cases ;

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but in this the crew were not treated on the footing of persons discharged, but as deserters, which they were not. If the crew had been clearly shown the alternative, I do not know that they might not have chosen to proceed in the vessel rather than forfeit the extra pay ; nor can I tell what facts or arguments they had it in their power to exhibit to the consul or to me, why they should be discharged on the usual terms. The question has never been fairly presented to them, nor the issue fairly made up. I cannot say what the consul's views were. If he thought the voyage was not up, I do not understand why he should advise that the men be paid off ; and if it was up, he should have adjudicated this matter of the extra wages. For deserters, the men were treated remarkably well ; and for persons entitled to be discharged, not so well. They were to be deserters, I suppose, to the extent of forfeiting their extra wages, but for no other purposes. This desertion *quo ad hoc* is new to me.

The remaining question concerns the alleged short allowance. The seamen do not agree very well with each other or with the witnesses for the claimants on this matter. I have read over the evidence with some care, and am not satisfied that there was short allowance of bread or meat until some time after the disaster off Cape Horn, which occurred about seventy-two days before the ship arrived at Gibraltar. The libel which was first filed said nothing about short allowance. The others state it, as I have said, variously. Whether the time of the vessel's stay at the Chincha Islands, waiting for guano, can be called a voyage, and if so, how long a voyage, under the statute, I consider to be doubtful. But I do not find in the evidence that there was any short allowance at that time, nor until about sixty days from Gibraltar. Off Cape Horn, in a very severe gale the ship was much injured, especially by heavy seas, which broke in the cabin doors and windows, and spoiled a good deal of the bread which was in the locker made for the purpose in a place usually adopted for lockers in large vessels in this trade. It has been a point of dispute whether this locker was under deck as required by the statute. The evidence shows that the cabin was on the main deck, in a very strong and well-built house, and that the poop deck came over a part of the cabin, but not over that part in which the locker was situated. In common speech, the locker was in a house on deck, and I am inclined to

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the opinion that it was not under deck in the sense of the statute. It was in almost as good a place ; but, as was said in argument, a deck usually extends to the sides of the ship, and a house, with windows, is of a different construction, and, as the event proves, somewhat less secure. But this point need not be decided, because there was not enough bread provided. It cannot well be maintained that the voyage from Callao to Gibraltar is less than three Atlantic voyages ; — the answer says between two and three — and there were twenty-three persons on board the ship. The answer puts the amount of bread at a little more than would be necessary for one voyage, and supposing bread to have been impossible to obtain, which the evidence perhaps tends to show, though not very clearly, and assuming that this would be a valid excuse, and counting flour to be a substitute, the amount of both stated in the answer is scarcely more than enough for two Atlantic voyages. I consider that the substitution of flour, which is cooked by the ship's cook into good and wholesome bread, may be a substitute for ship-bread. The intimation of Judge Sprague to the contrary was in a case where the flour itself was served out to the men, and it did not appear that they could prepare it conveniently : *Foster v. Sampson*, 1 Sprague, 182.

All the evidence shows that after the disaster the men were on allowance of bread while it lasted, and afterwards of flour, some witnesses say a pound, and some less. Judge Sprague has decided, and Judge Betts has expressed the opinion that while the navy ration is the usual standard for bread or meat, yet if there is a want of other articles, the deficiency ought to be made up in bread or meat. Which means, I suppose, that there is no absolute standard of quantity for those articles taken by themselves, and while somewhat less than the navy ration of bread, for instance, may do when there is abundance of other vegetable food, somewhat more must be given when there is a want of other things. And in this case it is clear that there was a short allowance in this sense, for about sixty days. If this could be attributed to the storm alone, it ought not to be visited upon the owners ; but the statute requires very great quantities to be laid in, with a view partly to provide for accidents and contingencies, and if the requisite quantity of bread had been provided, there is every reason to believe that enough would have escaped injury to leave ample provision for the remainder of the

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voyage, since only a part of the bread in the locker and none in the poop was injured. Of meat the men appear to have had a pound a day throughout; and I am not prepared to say that this was short allowance to entitle the men to two days' extra pay, for that and bread too. The rule in this district, affirmed by the circuit court, is that every day's short allowance of each of the three articles mentioned in the statute entitles the men to a day's wages; that is, two days' wages for each day that two are short, and so on: *Collins v. Wheeler*, 1 Sprague, 188. But when the short allowance is general, and not specially of meat, but of beans, rice, &c., I do not consider it just to say that they are short of both bread and meat, when an extra allowance of bread would have sufficed to prevent their suffering. Of animal food they had all that the navy ration calls for; of bread or its substitute, it is doubtful whether they had even that, and at any rate they had less than they ought to have had in the dearth of other articles. This is shown, among other things, by the captain's intention to put into Pico or Madeira had the wind and weather permitted; and indeed by the fair preponderance of all the evidence.

It seems to me, therefore, that the libellants, excepting Gardner and Peterson, are entitled to four months' extra wages; two for their discharge at Valencia, and two for short allowance of bread. Gardner has been paid, since action brought, a sum which he accepted with the advice of his proctor in full settlement. I do not feel at liberty to disturb such an arrangement. Peterson is not, in the language of the act of 1803, "designated on the list" as a citizen of the United States, but as living in Denmark. He shipped at Callao for Gibraltar and a port of discharge, and was discharged by the consul at Valencia, who certifies that he has been fully paid. If one so shipped were proved to be, in fact, a citizen of the United States, the contract might not in all cases be conclusive against him; but if a foreigner serves from one foreign port to another, perhaps to his own home, on an American ship, I do not know why he should demand payment beyond his contract for being discharged there, even if he in fact wishes to go to the United States. He can only have damages for the short allowance.

Decree accordingly.

C. G. Thomas & J. J. Storrow, for the libellants.

H. W. Paine & R. D. Smith, for the claimants.

THE IRIS.

1870.

A steamer was navigating a channel with six barges lashed to each side of her, and a schooner was outsailing and passing her. The steamer ported her helm to avoid a shoal, and thus brought one of the barges across the schooner's track. There was time for the latter to change her course, but she failed to do so; *Held*, the schooner was in fault.

The libel on behalf of the barge did not mention the steamer's change of course, but only the schooner's fault in keeping hers; the answer on behalf of the schooner averred the steamer's porting her helm; *Held*, the state of the pleadings did not preclude a recovery by the barge.

COLLISION. — The steamer Princeton was passing through the channel called the Kills, between the shores of Staten Island and New Jersey, towing twelve barges, six of which were lashed to each side of the steamer, forming a moving body of about three hundred feet in length and of considerable width. Off New Brighton the libellant's barge, which was the rearmost of the tow on the starboard side, came in collision with the schooner Iris, and was sunk and totally lost. This was a proceeding against the schooner to recover the value of the barge and her freight; the cargo being the subject of a separate suit.

The libel stated the time and place of collision, and averred that the schooner was bound to clear the barge, but neglected so to do, and kept her course, and thus caused the collision. The answer set up that the schooner was passing between the barges and the shore of Staten Island, as near the shore as was safe, and that the steamer changed her course and drew the barge across the track of the schooner, and that the collision was brought about by the steamer not keeping as near the New Jersey shore as she might have done, and by the want of lights and lookout and steersman on board the barge.

LOWELL, J. The evidence is not quite as full and minute as in a case of more pecuniary importance it might be expected to be. Taking it as it stands, I find the facts to be that the pilot of the steamer ported his helm some time before the collision without knowing that the schooner was near; but that he did this in order to keep the usual course, that is, to follow a bend of the channel

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which here sweeps to the right, avoiding a shoal. The schooner was outsailing the steamer and her heavy tow and passing between her and the shore on the starboard hand, which brings the case within the seventeenth sailing rule, that every vessel overtaking another shall keep out of her way, a rule which modifies the otherwise universal rule fifteen, requiring steamers to avoid sailing vessels. The reason given by the master of the schooner for not keeping out of the way is that the steamer ported her helm and brought the libellant's barge into contact with his vessel. This is true; but it also seems to be proved that the change was a proper one, and one that the schooner might have anticipated; and that it was made so long before the collision that the schooner had ample time to conform to it. Her master says he could not luff because there was a lighter on his bow, between him and the shore; but on this point he fails of support by any other witness, and I consider the weight of the evidence to be that he might and should have luffed.

Then the question is, was the steamer to blame in changing her course when and to the extent she did? Might not a less change have been enough to clear the shoal, and was she bound to see the schooner? The general rule undoubtedly is, that when one vessel is to take the burden of avoiding another, the latter is to keep her course. But how far a vessel is bound to keep a look-out aft, or to take measures to know whether another is coming up behind her, has not often been a subject of judicial decision. I should say that if a vessel is making a great change of course, such as going about or the like in a narrow channel, especially if the change is taken suddenly or without obvious necessity, prudence would require that others should not be put in jeopardy, but the time and manner of the change should be adapted as far as possible to meet the necessities of other vessels; but here was a change which was necessary, and which was not so sudden or so great that any danger to vessels on the starboard could naturally be expected; and I am not prepared to say that any other or different course would or ought to have been taken if the pilot had known that the schooner was in the act of passing. The preponderance of the evidence is that this precise change was proper and necessary, and that it was one which would not have en-

dangered the schooner unless she had been either too near or not sufficiently vigilant.

So far as lights or lookout on the barge are concerned, it seems that each vessel was in full view from the other, and that there was nothing necessary or useful to be done on board the barge, except to hail the schooner, which the master of the barge swears he did. When barges are towed in the way these were, that is, by being firmly lashed to a steamer, it is not usual to steer the barges, because they move with the steamer. I must therefore hold the schooner to blame for not keeping out of the way of the barge.

It is urged, however, that there can be no recovery in this case, because the allegations of the libel do not correspond with the proofs. It is true that the libel does not aver that the steamer changed her course; but it does aver that the schooner kept hers, and thus brought on the collision. The answer, not denying that the schooner kept her course, sets up the change on the part of the other vessel. I find that both are true; that the steamer did change her course and that the schooner did not, but that the change was justifiable under the circumstances, and that it did not relieve the schooner from the obligation of keeping out of the way. It turns out then that the libel which imputes fault to the schooner in not changing her course is sustained. I doubt whether, even under the strict rule adopted of late by the privy council in England, as shown by the cases of *The Ann*, Lush. 55, and *The North American*, Swabey, 358, there could be said to be a variance between the allegations and the proofs. But our practice is somewhat less stringent. The object to be attained is that the defendant should know what he is called upon to meet, and in arriving at this object, we allow in the first place great latitude of amendment, and in the next we inquire whether there is in fact surprise in the particular case rather than whether on theory there might be presumed to be such. It has been settled by the highest authority that there is no technical rule of variance in our admiralty practice: *Dupont de Nemours v. Vance*, 19 How. 172; *The Clement*, 2 Curtis, 363. In the former of these cases a libellant, proceeding for the non-delivery of his goods on a contract of affreightment, was permitted to recover a general average



Ex parte Packard. — Re Butler.

contribution for their having been jettisoned ; in the other, the owners of a brig who alleged that a schooner caused the collision by changing her course, recovered damages on proof that the schooner kept her course when she should have changed it. Both these cases show a much wider departure than is found in the case at bar. Here there can have been no surprise, because the change of course of the steamer is set up in the answer, and the reason for it is given by one of the claimant's witnesses. It is true that at the trial evidence of the necessity and propriety of the change when offered by the libellant in reply to the claimant's case was objected to, but the objection was not put on the ground of surprise, but because it was not strictly in reply. The case then comes to this. One party alleges that the other should have changed and did not ; and the other that the first should not have changed and did. I find the facts alleged by each to be true, but the explanations of the one to be sufficient and those of the other to be insufficient. There is no rule of pleading which requires me to dismiss the libel under such circumstances.

Decree for the libellant for \$1000.

H. C. Hutchins & J. A. Gillis, for the libellant.

T. K. Lothrop & I. Lincoln, Jr., for the claimant.

Ex parte DEW. C. PACKARD. — Re B. BUTLER.

1870.


If a mortgage is for money advanced at the time, and the mortgagor assures the mortgagee that the money is to be used in his business, and there is no evidence that these statements were false, the mortgage must be held valid, though it was given out of the ordinary course of the trader's business.

LOWELL, J. This case illustrates the difficulties which surround the construction of the thirty-fifth section of the bankrupt act. Taken abstractly it is difficult to distinguish this transaction from that arising under the same bankruptcy, in which the mortgage was decided to be voidable by the assignee, and yet I have no

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doubt that this mortgage is valid. See *Ex parte Mendell, Re Butler, supra*, 506.

The mortgage here, as in that case, was of the whole stock in trade in one of the two shops kept by the bankrupt, and was out of the ordinary course of his trade. The differences are that this mortgage was two months earlier than that, before the debtor's affairs were desperate, and was given for money advanced at the time, without any cause of suspicion excepting the fact itself that such a mortgage was offered as security. In the former case it was impossible to doubt that the whole transaction was an attempt to prefer a particular creditor, and that the mortgagee might have ascertained the facts by the slightest inquiry. Indeed I expressed a decided opinion that he must have been acquainted with the nature of the affair, and intimated that he might prove his innocence and save his money by requiring the assignee to sue the preferred creditor for his benefit. If I am rightly informed no such action was taken, and the case, after some preliminary proceedings by way of appeal, was settled on the footing of my decree. The money that was borrowed of this petitioner went to pay several different persons, but in such a way that the assignee admits he could not follow it, and it seems the lender was told by the borrower that he was "all right;" that he needed the money for use in his business, and that he expected to receive a certain sum within a short time in a way that he explained. There is nothing to contradict this, nor even to show that the statements were not true, excepting that it now appears certain that Butler must have been insolvent at the time; that he knew he was insolvent, or that he really paid this money out with any intent to commit a fraud of any kind is not proved. Every case of this sort must be decided on its own facts, and it will never be possible to lay down any general formula applicable to all cases. The intent to prefer a creditor necessarily involves the idea of an expectation of paying some others less than their whole debt, and this expectation is not always proved by the proof even of a known insolvency; there must be a fear or anticipation of stopping payment, which, indeed, may often be inferred from insolvency, or from acts which have a tendency to produce it, but which is to be decided as a fact in each case. Here it is not shown to my satisfaction that the borrower



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intended to use the money by way of preference, nor that the lender could have ascertained such an intent by inquiry. I shall not readily assent to a sweeping rule prohibiting insolvent persons from borrowing money on mortgage, even of their stock in trade, nor to one requiring mortgagees to see to the application of the money they lend. If it be true that the petitioner was put upon inquiry, it seems that he was not likely by any usual inquiry to discover any thing to prevent his lending the money. While it is true, as I held before, that a mortgage may be avoided if the mortgagee is privy to a preference, even though the preferred creditors themselves are innocent, yet this case does not come within that rule, because neither is a preference proved, nor knowledge or means of knowledge on the part of the mortgagee. The burden of proof that the thirty-fifth section casts upon one who takes security out of the course of business is met by the uncontrolled evidence of the bankrupt.

Petition of the mortgagee for payment to him of the purchase-money of the mortgaged goods granted.

H. C. Hutchins, for the mortgagee.

T. F. Nutter, for the assignee.

Re H. S. EVANS.

JANUARY, 1871.

Where a trader had given a fraudulent bill of sale of his stock and fixtures, and the vendee had taken possession of the fixtures and converted them into money, and the stock had then been attached by a deputy-sheriff as the property of the trader, and the trader had afterwards become bankrupt, and the officer had delivered the goods to his assignee in bankruptcy, and the fraudulent vendee of the stock had sued the officer at law: *Held*, the district court would not enjoin the suit against the officer, because he had an adequate and complete defence at law.

Whether the district court has jurisdiction to restrain such an action, *quære?*

The court will retain the bill in such a case against the vendee himself, for an account of the fixtures converted.

Such a bill must be filed in the district court as a distinct suit, and not as a petition in the bankruptcy.

THIS petition was filed in bankruptcy, but in its form was a bill in equity, in which the assignee of the bankrupt and B. F. Bayley, a

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deputy-sheriff, complained that one Jeffers had a bill of sale of the bankrupt's stock in trade, and had sued Bayley in an action in the nature of trover in a State court for attaching it as the property of Evans. The prayer of the petition was, that Jeffers be restrained from further prosecuting his suit against the officer, and from bringing any suit against the assignee, and be required to deliver up his bill of sale to be cancelled. The stock was attached before the bankruptcy, and the attaching creditors required the sheriff to retain his possession of it, and after the bankruptcy he delivered it to the assignee, who disposed of it as assets. The bill of sale was alleged to be fraudulent and void, and Jeffers was said to have taken possession of the lease and fixtures which were not attached, and for which the assignee asked an account.

LOWELL, J. — It is said to have been decided by Mr. Justice Clifford, sitting in the district of Rhode Island, that actions by assignees against persons "claiming an adverse interest" should be by regular suits at law or in equity as the facts may require, and not by summary petitions in the court of bankruptcy. I suppose this decision is to be taken subject to the qualifications of §§ 6 and 25 of the statute, the first of which gives power to any persons who choose to submit to the jurisdiction to take the opinion of the district court on a case stated, and the latter gives the court of bankruptcy power to order the sale of property in the actual possession of the assignee, who is to hold the proceeds instead of the property, subject to all lawful claims and liens. And I may add that, on general principles the assignee, who is an officer of the bankrupt court, may be proceeded against by summary petition in respect to any fund in his hands, if the opposing party chooses to proceed in that way, though the assignee himself has no right to take similar action against third persons. The decision to which I refer has not yet been written out; but I take it to be the law that, subject to the exceptions which I have referred to, the assignee must bring his action. The petition here is a bill in equity in all its substance, and even in most matters of form, and may be transferred to the district court, if the assignee shall be so advised. A similar order was made in the Rhode Island case.

In the mean time, as the merits of the case have been fully argued, I see no impropriety in giving my opinion upon them. Assuming

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that the bill of sale by Evans to Jeffers was voidable by the creditors of the former, as I must assume on demurrer, I yet cannot restrain the suit of Jeffers against the attaching officer, because the latter has a valid defence, and one which the State courts are ready to uphold. It has been twice decided by the supreme judicial court of Massachusetts, that an officer may prove in reduction of the damages in such an action that the conveyance was a fraud on the bankrupt act, and that he has given over the property to an assignee in bankruptcy. This works more complete justice than would an injunction, because a fraud on the bankrupt act is no fraud unless bankruptcy intervenes within four months or six months, and therefore a suit begun before the bankruptcy by one whose title is good against every one but the assignee, was rightly brought, and ought to hold good for the costs, unless under such peculiar circumstances that the State court would refuse them. The cases to which I refer are: *Perry v. Chandler*, 2 Cush. 237, and *Hanson v. Herrick*, 100 Mass. 323. Indeed I do not know where to find the jurisdiction of this court to try a case between an attaching officer and a stranger to the bankruptcy, or to enjoin such an action pending in the court which has jurisdiction of it. I find by examination of the files in Maynard's case, pending in 1842, part of which is recited in *Perry v. Chandler, ubi supra*, that Judge Sprague was asked to enjoin that suit against the sheriff, but did not do so. The first draft of the decree contains such an order, but it is stricken out and forms no part of the completed record. Judge Sprague did order the mortgage in that case to be cancelled. In this case it does not appear that the assignee has been or is about to be sued or molested in respect to the property, and it seems entirely fit that the case now pending in the State court should be unembarrassed by any preliminary action of this court in equity.

The defendant is bound to account to the assignee for the fixtures and other things which he actually received under the bill of sale, and if the decree here should precede the trial in the State court, *valeat quantum*. In Maynard's case the opposing interest was that of a mortgagee, and this court being possessed of the property was the proper tribunal in which to ascertain and establish or set aside all asserted incumbrances and liens, and if the mortgagee

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did not proceed the assignee was bound to do so. In the case of a person claiming not a mortgage but an absolute adverse title, this court has no such exclusive authority, and it is now well settled by the cases above cited, that the State court will give full effect to the defence set up by the officer under the bankrupt law, and thus try the case upon the same title and rules as would be followed here.

Case dismissed as to Bayley. Retained for an account by the defendant to the assignee, and for this purpose to be transferred to the district court.

J. D. Ball, for the petitioners.

G. A. Somerby, for the respondent.

Re J. R. STOWERS & AL.

JANUARY, 1871.

One partner may petition to have himself and his copartner adjudged bankrupt after a dissolution of the copartnership.

He will not be estopped from petitioning by having undertaken to pay all the joint debts, the joint creditors not having accepted him as their sole debtor.

BANKRUPTCY. — This was a petition by Stowers alleging that he had been a partner with one Johnson, and that the firm had been lately dissolved, but was insolvent, and praying that a joint warrant be issued against their estate. There were allegations tending to impeach the fairness of the dissolution on the part of Johnson. The evidence was that Stowers bought out Johnson and paid him five thousand dollars for his interest in the joint assets, and gave him a bond to pay all the joint debts, and very soon after discovered that he had paid him too much. Stowers then sold out the stock in trade to Cobb & Co., taking notes on long time, and offered to settle with the creditors for seventy-five per cent of their debts. Failing in a settlement, he brought this petition.

LOWELL, J. The petitioner does not stand in a very enviable position, for, whatever may be the merits of his controversy with his late partner, it is clear that he has committed a technical fraud, at least, by conveying away all his property in order to gain

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an advantage in settling with his creditors or with his partner. Notwithstanding this, I must decide the case on the law and evidence as a case in bankruptcy. After a dissolution of copartnership, either partner may apply to have the firm adjudged bankrupt if they are in fact insolvent: *Thompson v. Thompson*, 4 Cush. 127. I have often taken jurisdiction of joint petitions in such cases, a course of action which involves substantially the same question. This being so, the only doubt is whether this petitioner stands differently from other copartners. He has undertaken to pay all the joint debts, and if this were an ordinary suit he might be precluded from setting up, as against Johnson, that the debts which he has undertaken to pay remain the joint debts of the firm, for they both agreed to treat them as the separate debts of Johnson. But in bankruptcy, if the firm is really insolvent, the partner who petitions is acting for the creditors as well as for himself, and it cannot be doubted that the joint creditors could proceed against both debtors in bankruptcy, unless they had agreed to accept Stowers alone as their debtor, which the creditors of this firm have not done. It seems to me, therefore, that the doctrine of estoppel does not apply, and that Johnson and Stowers, or either of them, might, after the dissolution, petition for the benefit of the act on behalf of the firm. Such a proceeding by partners differs in this from one by creditors, that no act of bankruptcy need be alleged, but only that the firm is insolvent. If then we decide that a partner cannot petition by reason of any contract with his copartner, we deprive the creditors of the very important power of procuring adjudication through the petition of one partner when the firm is clearly insolvent, but no technical joint act of bankruptcy has been committed.

The evidence here shows that the firm is insolvent, and that it was so before Stowers made the conveyance to Cobb & Company, and that Johnson has not himself the present available means to pay the joint debts on demand. Whether if he had the ability he could defend successfully such an action as this except by actually paying the debts, I need not now decide.

As I understand the principal ground of defence, it is this: That there was no insolvency until Stowers caused it after Johnson had retired from the firm. The evidence upon this

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point is not quite distinct. There was no actual failure to pay before that time, but they needed indulgence and forbearance from their creditors. But granting that they were not insolvent immediately on the dissolution, it seems to me that Johnson by intrusting Stowers with the payment of the debts, took the risk of his being both able and willing to do so, and that he cannot set up now that he left the firm solvent and that the act of the petitioner has changed the state of affairs. It seems a great hardship that one partner should be able thus to involve another, but it results from the relation between the parties, and all that the court in bankruptcy is concerned with is the fact of present insolvency. The argument would be no less strong before the firm was dissolved, that the petitioning partner had brought it to insolvency by his fraud or mismanagement, contrary to the articles, and without justification as between the partners; but no such defence has ever prevailed or been set up that I know of. I ought to say that Stowers believes himself to be the injured party, and alleges that his partner deceived him in various ways throughout their joint dealings. *Both partners adjudged bankrupt.*

C. P. Hinds, for Stowers.

J. Nickerson, for Johnson.

Re J. H. ALEXANDER.

JANUARY, 1871.

When a person is arrested here on a complaint charging him with a crime committed against the laws of the United States within another judicial district, the magistrate may lawfully receive in evidence a certified copy of an indictment found against him in that district.

Such evidence, if uncontrolled, is sufficient to authorize a warrant for his transfer for trial to the district in which the indictment was found.

HABEAS CORPUS. — The district attorney applied for a warrant to send the defendant to the district of Louisiana for trial on a criminal charge. The defendant was brought before a commissioner on a complaint, and the only evidence of probable cause was the cer-

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tified copy of an indictment returned to the circuit court of the United States for the district of Louisiana. No evidence was offered by the defendant. By consent of both parties, the facts were brought before the judge, and spread upon the records of the court, in order to a decision whether the course pursued by the government in the case was the true one, and whether the defendant ought to be held for trial in the district of Louisiana.

LOWELL, J. When an indictment has been found in one judicial district of the United States against a defendant not then within the jurisdiction, it has been much doubted whether the court in that district can issue its warrant to arrest the defendant wherever he may be found within the United States. The late Chief-Justice Taney, when attorney-general, gave it as his opinion that the power was possessed by the courts: 2 Opinions Attorneys-Gen. 564. And this appears to be still the opinion of the office: 11 Opinions, 127. I am not aware of any decision of a court or judge upon the point, and it is not necessary to decide it now.

That course not having been pursued, the next question is whether a copy of the indictment is sufficient evidence to authorize a committing magistrate out of the district to cause the accused person to be bailed for trial in the district in which the indictment was found. The point taken by the defendant is, that he ought to be confronted with his witnesses before the magistrate, as well as at the final trial. The law of Massachusetts seems to require this, Gen. Stats. ch. 170, §§ 10, &c., and it is copied from the Revised Statutes, ch. 135. I have been unable to trace it further back than the Revised Statutes, and I am informed that the practice both here and in Maine is, and so far as is known, always has been, to receive affidavits and other written evidence in proper cases on these preliminary hearings before commissioners. Such a course was sanctioned by the supreme court of the United States in *Bollman's Case*, 4 Cranch, 128; and this decision was acted on and explained by Chief-Justice Marshall in Burr's trial, pp. 11, 15, 97. Judge Conkling, in his Treatise, p. 631, represents this to be the true practice, and it has been usually followed, I believe, in the several circuits, as appears by the following cases: *In the Matter of Clark*, 2 Benedict, 540; *United States v. Shepard*, 1 Abbott, U. S. Rep. 431. So, too, in extradition between the several States under the

Re Connor and Hart.

constitution and act of congress, such evidence is admitted. The precise question undoubtedly is, what evidence was admitted in such cases in Massachusetts in 1789: *United States v. Reid*, 12 How. 361. But the law of Massachusetts may be presumed, in the absence of evidence to the contrary, to have been the same with that of New York and Virginia, and with the common law of England, of which the cases cited are evidence; and the practice conforms to this view. Although it has been usual both in England and America to examine witnesses before the committing magistrate in the presence of the accused, yet this has never been an essential prerequisite to holding an accused person for trial. He might always be arrested on the warrant of a coroner or of a court upon an *ex parte* examination before a coroner's jury or a grand jury. The indictment in the district in which it is found is an *ex parte* proceeding, but since it is found upon oath, and after the examination of witnesses, it has a presumption of validity. Before the commissioner it is only a piece of evidence, to be sure, and may be met and controlled, but when it stands by itself, and uncontradicted, it seems to be enough according to our practice to authorize the warrant. *Warrant to issue.*

Re CONNOR AND HART.

JANUARY, 1871.

A mortgage given by a trader under circumstances which make it a preference, will not be made valid by the existence of a general oral understanding, entered into when the debt was contracted, to give security when required.

If a preferred creditor abandons his security, and is admitted to prove his debt under section 23, the preference is condoned and cannot be set up in bar of the bankrupt's discharge.

BANKRUPTCY.—The facts in this case were that the bankrupts, retail dealers in trimmings, &c., borrowed several sums of money of one Sanborn, in June, July, October, and November, 1869, and gave their notes payable on demand, with an oral agreement that they would give a mortgage of their stock, if requested. On the 21st of December, Sanborn became alarmed by what he heard of

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the failure of other persons in the same trade with the bankrupts, and demanded his money, and not being able to obtain it, insisted on the mortgage, which was given. About a month afterwards, the defendants filed their petition in bankruptcy. The stock came into the possession of the assignee, who applied to the court for leave to sell it, and hold the proceeds until the validity of the mortgage should be ascertained; and to this the mortgagee assented. Sanborn was afterwards applied to by Connor to give up his security and come in as a creditor, on the ground that it would help him with his creditors, and this he did on receiving a promise of indemnity from Connor's father. A majority in value of the creditors, including Sanborn, assented to the discharge, which was opposed by a dissenting creditor on the ground of a fraudulent preference having been given to Sanborn by the mortgage.

T. F. Nutter & J. O. Teele, for the creditor, cited *Blodgett v. Hildreth*, 11 Cush. 311.

Asa Wellington, for the bankrupts. This was no preference, 1. Because not voluntary, and 2. Because given in pursuance of a valid promise.

LOWELL, J. It has not been contended that the defendants were not insolvent on the twenty-first of December, and under such circumstances a mortgage of the whole stock to secure a pre-existing debt is *primâ facie* a preference. By our law it is no sufficient answer that an oral agreement to give security at some indefinite future period, if demanded, was made at the time the debt was contracted. Such an agreement, resting only in oral contract, without possession of the property or any such circumstances as would create a legal or equitable lien, cannot be enforced against the assignees after bankruptcy, nor make a conveyance before bankruptcy but after insolvency legal, which would otherwise be a preference. I have always held that it would be too dangerous to permit such a contract to be carried into effect after the debtor had become insolvent, and feared that he might be obliged to fail. Such a promise really amounts to little more than an agreement to give a preference if occasion should arise for it. In charging the jury I have always guarded my ruling on this point by the qualification that if it was fairly and really one transaction, the creditor should not be injured by the insolvency of the debtor,

occurring or ascertained after the creditor's part of the contract had been carried out by advancing the money. Nor does the pressure of the creditor relieve the transaction of the character of a preference. Both these points have been repeatedly ruled by me; and they were so adjudged under the last bankrupt act. In the case of Charles Maynard, in bankruptcy in this court in September, 1842, Mr. Justice Story, in answer to certain questions duly certified under the bankrupt act of 1841, decided that it was wholly immaterial whether the mortgage was voluntary and spontaneous on the part of the mortgagor, or was given upon the request or demand of the mortgagee, or upon a verbal promise made in general terms, when the debt was contracted, to give security upon request, if at the time of giving the mortgage the mortgagor knew that he was insolvent and could not continue his business, and intended to give the mortgagee a priority over the other creditors. See *Arnold v. Maynard*, 5 Law Reporter, 296; s. c. 2 Story, R. 349.

But our law permits a creditor who has received a preference, to surrender the property or money to the assignee, without suit, and to prove his debt, share in the dividend, and exercise all the rights of a general creditor: section 23. This mortgagee adopted that course. It may be said that the assignees were put to the trouble of petitioning the court. But it is evident that the assignees themselves did not regard this as any fault or obstruction on the part of the mortgagee, for he has proved his debt without objection. In this state of the case, does the law require me to refuse the debtor his discharge? Section 29 says that a bankrupt who has given a fraudulent preference, shall not receive the benefit of the act. And in Massachusetts it was held in a case entirely analogous to this, that giving up the security would not avail the insolvent: *Blodgett v. Hildreth*, 11 Cush. 311. But the statute of that State in the section corresponding with section 23 of the bankrupt law, gave no right of repentance to the preferred creditor, but prohibited him from proving his debt in any event. Our act appears to be intended to hold out an inducement to such repentance; and this case shows that the supposed interests of the debtor may be brought in aid of that purpose, for it was through his friends that the arrangement was brought about. There is no evidence, indeed,

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that these objecting creditors were informed of the understanding which must have existed in respect to the operation of this surrender, or that they are in any way estopped. The question is simply of the law in such a case. I am of opinion that section 29 ought to be construed with reference to section 23, and that where under the latter section a preference has been fully condoned, so far as the preferred creditor is concerned, and the general creditors have been restored to the position they would have occupied if there had been no preference, the law does not intend the preference to be regarded as still subsisting against the bankrupt. The general creditors are not technically estopped, because they have no choice but to accept the surrender, but they have received a dividend out of this very property, in accordance with the policy of the law, which condones the fault of the preferred creditor, in consideration of his voluntary action, and I cannot think the law intended to give to him who is usually the active party to the technical fraud, and the only one benefited by it, all the advantages of the repentance, and withhold them from the other party. There are a great many doubtful cases in which an intent to prefer can only be presumed or inferred, and that somewhat violently, and there are many others in which there is not only no moral fraud, but even a strong moral obligation to pay the particular debt. The policy of the law appears to be to hold out a motive for the prompt settlement of all cases of this kind in favor of the general creditors, by forgiving mere preferences, when voluntarily abandoned, even after bankruptcy. In this forgiveness, the bankrupt, as it seems to me, may share; and he may lawfully reply to these specifications, that there was no preference such as section 29 contemplates, but only an attempted preference, abandoned before it was too late. A preference is the payment or security of a just debt, which becomes voidable only when bankruptcy intervenes within a few months. Now the legal effect of section 23 is to extend the time, and permit a voluntary rescission of the voidable agreement, or the refunding of the voidable payment, even after the general rights of all parties are fixed by the filing of the petition. Whether this rule would hold if it were proved that the parties intended to defraud the general creditors unless they were found out, I do not decide.

Discharge granted.

Re Hartwell.

CIRCUIT COURT.

Re J. F. HARTWELL.

JANUARY, 1871.

A sentence to the jail in Lenox, in the county of Berkshire, under a conviction for a crime against the United States, authorizes the keeper of that jail to hold the prisoner in Pittsfield, the jail which was kept at Lenox at the time of the sentence having been lawfully removed to Pittsfield by authority of the legislature of the State.

HABEAS CORPUS. — The relator was convicted in the circuit court of the United States of a crime, and was sentenced on 28th June, 1870, "to pay a fine of one hundred thousand dollars, and to be imprisoned and confined in our State's jail at Lenox in the county of Berkshire in this district for the term of five years, and to stand committed till this sentence be performed." The warrant or *mittimus* was directed to the marshal and the keeper of the jail at Lenox, and commands the marshal to deliver the body of the petitioner to the keeper of our said jail, and the keeper to receive the petitioner into his custody in our said jail, and him there safely keep until the sentence is performed, or he is otherwise discharged in due course of law.

By virtue of certain acts of the legislature of Massachusetts, the jail for the county of Berkshire, formerly situated at Lenox, has, since the sentence was passed and begun to be executed, been removed to Pittsfield in the same county, and the petitioner, together with the other prisoners, all of whom are held under authority of the State, are now confined in the new jail at Pittsfield by the respondent, who, as sheriff of the county, is keeper of its jail.

LOWELL, J. The able and learned argument for the petitioner, in which all the statutes bearing upon the subject, and such decisions as seem applicable, have been carefully collected, is that the further execution of the sentence has become impossible, by the lawful discontinuance of the jail in which the petitioner was directed to be confined; that neither the sentence nor the execution thereof can now be varied, because the power of the court over the case was gone when the *mittimus* was served, or at latest,

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when the term ended at which the sentence was passed; and the authority of the marshal was exhausted when he delivered the relator to the State officer; and as a consequence of these premises, that he must now be discharged.

I am inclined to think that neither the court nor the marshal has any further control over this sentence. When the petitioner was committed to the keeper of the jail, the marshal had fully executed his warrant, and thenceforward the respondent alone became responsible for the safe-keeping of the prisoner: *Randolph v. Donaldson*, 9 Cranch, 76. And the court cannot perhaps now reform or change the sentence: *Commonwealth v. Weymouth*, 2 Allen, 144.

The sentence is in the form long used in the circuit court. In the district court it has been usual to name the jail simply, without adding the county; as, "the jail at Dedham in said district." I do not, however, see any difference in their legal meaning. The sentence is to imprisonment in a certain jail, whether the county be named or not. Now the argument is, that a sentence to one jail cannot be executed in another. The commitment, indeed, as was well argued by the district attorney, is to the keeper of the jail: *Rex v. Fell*, 1 Ld. Raym. 424. The mere fact, however, that the keeper of that jail, happens to be keeper of other jails, would not of itself give him the right to keep the prisoner in any of his jails, at his discretion. The decision of this case must depend on the sentence rather than on the commitment, and the sentence was to the jail at Lenox. Has then the further execution of the sentence become impossible by the act of the legislature of Massachusetts? I think not. The law of the State necessarily controls all matters pertaining to the care, custody, and safe-keeping of the prisoners. When the statutes of Massachusetts authorize the removal of prisoners in case of disease, contagion, or fire, as in Gen. Stats. ch. 26, § 25, and ch. 178, §§ 48, 49, or to remove prisoners from one jail to another within the same county, as in ch. 178, § 2, it would seem that the sentence of the federal court must be construed as including that power and authority, and that it would not need an act of congress to ratify a removal of a prisoner of the United States when the occasion should arise. The State, indeed, cannot regulate the term of imprisonment

Re Hartwell.

directly or indirectly, as by laws for discharging poor convicts detained for fines only, or shortening terms for good behavior, and the like; but so far as the keeping is concerned, the laws of the State are to govern. It is somewhat doubtful whether a general act of congress could confer authority on a State or its officers to remove prisoners in certain contingencies. If not, there must be a special act of congress in each case, or an authority to some federal officer to act in concurrence with the authorities of the State. I suppose the sheriff, as keeper of the jail, has power, at common law, to remove prisoners to another jail, in case of fire, contagion, or other necessity. See as to persons committed for trial, *Bac. Abr. Gaol and Gaoler (C)*.

Another of the incidental powers conferred on the keeper of the jail and implied in the sentence is, that if the jail is lawfully removed, he shall remove the prisoners with it. The sentence need not recite that the keeper is to hold the prisoner at the jail in Lenox, unless and until there shall be some lawful occasion or necessity to remove him therefrom. All this is implied. I do not consider a sentence to the jail in Lenox to be different in legal intendment from one to the jail of the county of Berkshire, situated at Lenox. If there had been two jails in that county, a designation of one in particular would have been necessary, or at least convenient, but the legal effect would have been the same. It was not intended to point out a particular building, but a particular jail, and the argument would be equally strong for the petitioner if a new jail had been built at Lenox. The jail has been removed by the only authority that could remove it, and under statutes already passed when this sentence was pronounced. All the prisoners were lawfully removed with the jail, though the statute of Massachusetts says nothing about them: 1 Whart. R. 439, 445.

The prisoner must be remanded for three reasons: 1. The jail to which he was sentenced is the same in which he is now confined, though the building is different; 2. If not, and that jail has been destroyed, the keeper of the jail has a right to confine his prisoner in a substituted jail; 3. The State has a right to regulate the custody of prisoners within the State, including their removal from one jail to another, when necessary, and of this necessity the State, acting by its legislature, is the sole judge. The first

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point is entirely clear to my mind, and sufficient for the decision of the case.

Prisoner remanded.

H. W. Paine & R. M. Morse, Jr., for the relator, cited statute 30 June, 1834, 4 Stats. 739; Joint Resolution, 23 Sept. 1789, 1 Stats. 96; and the following statutes of Massachusetts: Stat. 1789, ch. 42; Stat. 1813, ch. 97; Rev. Stats. ch. 143, § 1; ch. 144, § 30; Gen. Stats. ch. 178, §§ 1, 2, 48, 49; ch. 179, § 1.

D. H. Mason, district attorney, and *F. W. Hurd*, assistant district attorney, for the United States.

DISTRICT COURT.

J. G. PARKER, *Assignee v.* W. B. BYRNES.

FEBRUARY, 1871.

It seems, that the seller of imported goods does not lose his right to stop them *in transitu* on the failure of the buyer, by the mere fact that they have been entered for warehouse, if they were not entered by the buyer, and he has exercised no acts of ownership over them.

But where the seller had goods on board ship which he sold on four months' credit, and took notes for the price, and handed all the shipping papers to the buyer, who entered the goods and warehoused them in his own name, the seller had thereafter no right of stoppage nor a lien.

So where the goods, being in a bonded warehouse, were sold on like terms, and the seller wrote an order of transfer to the buyer, which was accepted by the warehouseman, and handed all the papers relating to these goods to the buyer, and the goods were distinct from all other goods of the seller, he retained in law no lien or right over them.

It seems, that by the law of Massachusetts, a purchase of goods with an intent not to pay for them, is voidable by the seller, and so is a sale made upon the faith of any wilful misrepresentation.

Such fraud not found in this case.

BILL in equity by the assignee of Edward Oakes to ascertain the title to certain parcels of salt in bond.

Oakes had been a well known salt merchant in Boston for a great many years, and had dealt largely with the defendant Byrnes. In December, 1869, the defendant sold Oakes three several lots of salt on a credit of four months, and took his notes for the price. The

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first lot had been entered by Byrnes under the warehousing acts, and was in the bonded warehouse of Naylor & Company, on Constitution Wharf. The defendant gave Mr. Oakes a receipted bill of parcels, the necessary papers for getting the goods out of warehouse, and an order on Naylor & Co. to deliver "five hundred and twenty-five sacks Ashton salt, bal. lot ex ship Arcadia in good order," and this was accepted in writing by the warehousemen. The defendant afterwards made a memorandum on the back of the order that storage was to begin about the third of January, 1870. The second and third lots were both on board ship, at the time of the sale, and were entered and warehoused by Oakes, who never removed the goods nor paid the duties, and when he stopped payment in February the defendant wrote him that he should not complete the sale nor deliver the salt, and tendered him back his notes which were not accepted but returned by Oakes. The defence was that the sale had been procured by fraudulent representations by Oakes of his commercial standing, and that it had never been fully completed.

T. H. Sweetser & T. Weston, Jr., for the plaintiff.

H. W. Paine & T. F. Nutter, for the defendant.

LOWELL, J. The mere fact that goods imported from abroad upon the order of a buyer have come into the hands of the officers of the customs, and have been by them put into a warehouse, the buyer exercising no acts of ownership over them, has been held not to determine the transit: *Burnham v. Winsor*, 5 Law Reporter, 507; *Donath v. Broomhead*, 7 Barr, 301. Nor does the seller's right depend on the question whether the property has passed. In the case of *Barrett v. Goddard*, 3 Mason, 107, cited at the bar, the lien of the seller was disallowed, although the goods remained in his own warehouse, because the title had fully vested in the purchaser. But I take the modern doctrine to be, that if the buyer stops payment before the seller has actually parted with possession, though after he has parted with the title, if no rights of innocent third persons have intervened, his lien revives, if he is able to give up the note received for the price; and that an assignee in bankruptcy stands in this, as in all other cases not involving fraud, on the precise footing of the bankrupt himself: *Arnold v. Delano*, 4 Cush. 33. So that if it were true, as assumed by the defendant in

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his letter of the ninth of February, that the possession was still in him, he had a lien somewhat analogous to the right of stoppage *in transitu*, which he might enforce against the bankrupt, and against the present plaintiff. In the case of the two lots entered, and warehoused by Oakes, it is now admitted that there was no *scintilla* of possession left in Byrnes. And it seems to me equally clear that Oakes was in possession of the Ashton salt. The defendant had made over all the papers necessary for the withdrawal of this salt from the warehouse; the warehouseman had agreed to look to Oakes as his principal, and the order itself shows that the salt was all that remained of a certain cargo, and so must have been separate and distinct from all other goods. This was all the delivery that the nature of the case required, and Naylor & Company thereby became the agent of Oakes, and ceased to be the agent of Byrnes, which is the usual test: *Hollingsworth v. Napier*, 3 Caines's R. 182; *Carter v. Willard*, 19 Pick. 1; *Foster v. Frampton*, 6 B. & C. 107. In the case of *Mottram v. Heyer*, 5 Denio, 629, it is said by the chancellor that the mere entry of the goods by the consignee will not put an end to the right of stoppage, nor will the storing them by the revenue officers for safe-keeping; but he adds that if they were warehoused under the direction of the consignee in accordance with the acts of congress, the delivery would be complete. It is argued that the order on Naylor & Company contained the implied condition that the duties should be paid before delivery, and this is true. But it was not a condition imposed by the seller, and had no relation to the contract between these parties. The order was, in effect, to hold for Oakes as the warehouseman had before held for Byrnes, subject to the act of congress which requires payment of duties before the removal of the goods out of custody. The word delivery, therefore, as thus used in argument introduces a fallacy. The seller parted with all the possession which he had, unconditionally; and the constructive delivery by order and acceptance, was a legal equivalent for actual delivery, and put an end to all transit, and all lien on his part.

The evidence does not satisfy me that there was fraud in the purchase. Byrnes says that Oakes told him that his note was good and would be paid, and it seems that Oakes must at that time

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have been insolvent. No questions were asked of Oakes by either side concerning this representation, an oversight which may have arisen from the irregular mode in which the case was prepared, the answer having been filed after his deposition was taken. But he undertakes to tell all that passed between the parties, and his silence on this point is to some extent contradictory of the statement of the seller. I take it to be the law of Massachusetts, which governs this contract, that a fraudulent misrepresentation by the buyer, relied on by the seller, will avoid the sale. And a purchase of goods with a distinct intention not to pay for them will have a like effect. This doctrine has been denied in some other States, but is adhered to in this commonwealth : *Dow v. Sanborn*, 3 Allen, 181 ; *Kline v. Baker*, 99 Mass. 253 ; *Biggs v. Barry*, 2 Curtis, C. C. 262. It may be difficult of application, but there are cases in which it would apply. If it were proved that a merchant, knowing himself to be insolvent, bought goods for the express purpose of putting them or their proceeds into the hands of a favored creditor, and expected then to stop payment, the sale could be avoided within the meaning of the Massachusetts authorities as I understand them. This is, in substance, the ground taken by the defendant ; but I am not satisfied that it is made out in evidence. All the circumstances of the sale tend to prove that Oakes was acting as a buyer usually acts, that he made a good bargain, and was tempted by the low price ; and there is nothing but the actual state of his affairs and of his dealings about this time in the way of paying off his friends that has any tendency to establish fraud. He swears that he did not know of his insolvency, and did not expect to stop payment, and that he was forced into failure by the conduct of his brother in holding money, put in his hands for another purpose, as a set-off for a large debt due him. Undoubtedly there are circumstances which tend to throw suspicion on this transaction with the brother ; but they are not sufficient to enable me to say that the bankrupt's whole conduct for two months was fraudulent, and that his business was kept alive merely to enable him to prefer his friends ; and to this extent must the evidence go before this particular contract can be set aside on the ground of an intent not to pay, because as to these particular goods there is no evidence whatever that he intended to

Re Blandin.

use them as a means of fraud ; so that this sale can be avoided on that ground only if all sales made to the bankrupt at or after that time can be avoided.

As to the misrepresentation, it appears that the defendant had dealt with Oakes for years, and had no reason to make any particular inquiries, and made none excepting casually and in very general terms ; and when Oakes stopped payment, the rescission was demanded on totally different grounds without any allusion to a misstatement. The bankrupt is not asked about it, and mentions no inquiries or representations ; but does say that he had no knowledge of insolvency or intention or expectation of failure. Upon the whole, I do not find that there was a fraudulent misrepresentation made by the buyer and relied on by the seller. If any thing was said it was scarcely more than is implied in the giving a note on four months, and I am not satisfied it was fraudulently said, and it seems to have made but little impression on the mind of the seller, and not to have been recalled even when the failure was made known to him.

Decree for the plaintiff.

Re E. G. BLANDIN.

FEBRUARY, 1871.

The bankrupt's wife may prove as a creditor against his estate in bankruptcy for money realized by him out of property which she held as her separate estate under the statutes of Massachusetts, if the evidence clearly shows that the transaction was intended to be a loan and not a gift.

BANKRUPTCY. — This was a petition by the wife of the bankrupt for the allowance of a claim against his estate for property lent by her to him, with a promise made by him at the time of the loan that he would repay her. The property consisted of stock and money in savings banks to the amount of two thousand dollars, which the wife received as a distributive share from her mother's estate. With this the husband bought out a grocery store in Taunton, and after carrying on business for about a year, he failed. The question was whether such a claim could be proved against the estate of the husband in bankruptcy.

Re Blandin.

LOWELL, J. The statute of Massachusetts gives married women power to contract concerning their separate property, and to sue and be sued in all matters relating to the same, as if they were sole. Gen. Stats. ch. 108, §§ 1-6 In this respect, the act may be said to be declaratory of the rules before adopted by courts of equity, though going much further in ascertaining what shall be considered separate property. This statute does not give any right to husband and wife to contract with each other, or to sue each other, at law: *Lord v. Parker*, 3 Allen, 127; *Edwards v. Stevens*, ib. 315; *Knowlton v. Hull*, 99 Mass. 564. The bankrupt, therefore, having borrowed of his wife the money and personal property from which money was realized, the contract to repay it could not be enforced at law. And it is generally true, that a contract void at law is void in equity. To this general rule there are well-known exceptions, one of which is a contract between husband and wife concerning her separate property, which courts of equity will uphold and enforce. In this way a wife may become the creditor of her husband: *Fenner v. Taylor*, 1 Sim. 169; *Towers v. Hagner*, 3 Whart. 48; *Riley v. Riley*, 25 Conn. 154.

I do not understand that it has ever been decided in this commonwealth that these doctrines do not fully apply in equity to separate property held under the statute. It seems to me that the statute merely enlarges the field for the application of those doctrines; and I apprehend that, if a husband should possess himself of his wife's property, whether by force, by fraud, or by virtue of a contract to repay it, very little difficulty would be found in discovering a remedy in the courts of the State. The cases of *Turner v. Nye*, 7 Allen, 176, and *Phillips v. Frye*, 14 Allen, 36, differ essentially from this case, because in neither of them was the property the separate estate of the wife; if it had been, I venture to think that the former case would have been decided in favor of the wife, although the latter might have been embarrassed by the want of full equity powers in the courts of probate. The turning point in both those cases was that the property not being separate, there was no valuable consideration for the promise, an objection equally fatal in equity as at law. In this I may be mistaken; but if so, it is not upon any question of the local law, but of the application of general rules of equity to that law, which is a point

Re Blandin.

I should be obliged to decide for myself in any event. And my opinion is that in equity the petitioner has a right to be repaid out of the husband's estate, whether his obligation be called an equitable debt or a trust.

Whether in any given case the wife has such an equitable claim, is a question of fact. If she has permitted her husband to use her money, and especially her income, for a long course of years, the presumption of a gift is almost irresistible, and if a gift, she cannot recall it: *Caton v. Rideout*, 1 McN. & G. 599; *Gardner v. Gardner*, 1 Giff. 126. If, on the other hand, he obtained the money without her consent, or on a promise to hold it as a trustee or to repay it, he must do so: *Rich v. Cockell*, 9 Ves. 369; *Darkin v. Darkin*, 17 Beav. 578; *Rowe v. Rowe*, 2 De G. & S. 294; *Walker v. Walker*, 9 Wallace, 743. In this case the evidence shows that the money realized from the wife's separate personal property was to be repaid.

Under these circumstances the wife claims the right to prove for the amount against the husband's estate in bankruptcy, or that the court, under its equitable powers, should order such a sum as may be just to be paid out to her by way of settlement. The case does not come within the latter alternative. There is no *chose in action* or special fund in the hands of the assignee, with which a court of equity can deal; the money has gone into the mass of the husband's assets, and the petitioner must come in as a general creditor, or not at all. That she or her next friend may prove as a creditor was held *In re Bigelow*, 2 N. B. R. 170; *Ex parte Wells*, 2 Mont. D. & De G. 504; *Ex parte Thring*, Mont. & Ch. 75. It is very doubtful whether such a debt could have been proved under the insolvent law of Massachusetts, for that law was considered to refer only to legal debts: *Robb v. Mudge*, 14 Gray, 540; but I have little doubt that equitable debts are within the scope of the bankrupt act. It seems to me to be the intent of that statute to give all creditors an equal share of the assets without regard to the mode in which their rights might have been enforced if there had been no bankruptcy; and that the debtor should be discharged from all debts and demands which are liquidated or capable of liquidation. In respect to both debtors and creditors the act is highly remedial, and the district court is vested with most ample equitable powers

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to enable it to work out full remedies to all persons. It has always been the law of England that equitable demands may be proved in bankruptcy: *Ex parte Williamson*, 2 Ves. (Sen.) 252; *Ex parte Taylor*, 2 Rose, 175. "A commission in bankruptcy," said Lord Eldon, "is nothing more than a substitution of the authority of the lord chancellor, enabling him to work out the payment of those creditors who could by legal action or equitable suit have compelled payment": *Ex parte Dewdney*, 15 Ves. 498. The nineteenth section of our statute makes provable all debts and liabilities, in language broad enough certainly to cover such as a trustee owes to his *cestui que trust*, or a partner to his copartner; and so of demands which, but for the bankruptcy, would be properly cognizable in a court of admiralty. If this be not so, I do not see how the law can be uniform, for proof of debts will depend on the remedies given in the several States, in one of which the very same debt might be sued at law which in another must be prosecuted in equity, and in some of which there is no distinction between law and equity.

The twenty-fourth section provides that a creditor who appeals from the rejection of his claim, shall file a statement in writing, setting forth the same substantially as in a declaration at law, and that like proceedings shall be had as in an action of law. This section, perhaps, is the one on which a doubt is raised, as it is precisely like the one referred to in the observations of the court in *Robb v. Mudge*, above cited. But the provision here seems to be made for the ordinary case. It is seldom that a debt is offered for proof, that could not be sued at law; and in this section, if it is to be taken literally, this very rare case is overlooked. But there is no sort of doubt that the circuit court has full appellate power, and that it may take such order in relation to appeals not fully provided for by section twenty-four as may be necessary to conform the proceedings to the nature of the case. It was not at all the purpose of that section to prescribe what debts might be proved, but merely the mode of conducting appeals; and it is, therefore, but slightly and incidentally that it supplies an argument for any construction of section nineteen.

The real difficulty in these cases is found in the evidence. There is great danger of fraud and mistake, and all demands of

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this sort must be examined with the utmost care. If on such examination the case is fairly made out, I have no right to disregard well-settled rules of equity, which declare and uphold the wife's right to recover.

Mrs. Blandin is to be admitted as a creditor for two thousand dollars, the sum advanced, without interest, the evidence showing no contract for interest.

Order accordingly.

C. A. Reed & G. M. Reed, for the petitioner.

J. H. Dean, for the assignee.

G. W. BOURNE v. HEMAN SMITH.

MARCH, 1871.

A usage for masters of whaling vessels to wait for their lays until the owners shall choose to sell the oil is unreasonable and void.

It seems, that a master might, for a valuable consideration, bind himself so to wait in a particular voyage.

The burden of proving such an agreement is on the owners.

Such an agreement held not to be proved in this case.

The master is not to suffer a diminution of his lay for oil sold on credit and never paid for, though due diligence was exercised by the owner.

WAGES. — The libellant proceeded for his lay of one-thirteenth in the oil and bone procured on the Atlantic whaling cruise of the schooner William Martin, of which he was master, and the defendant was managing owner. The voyage began in November, 1867, and ended in September, 1868; and the libel was filed in March, 1871. The answer admitted the voyage and stated the amount of oil taken, but set up as a bar to the action, that on the arrival of the vessel, the libellant instructed and requested the defendant as agent of the vessel and her owners to take the oil and keep it until he should think it for the interest of all concerned to sell, which time has not yet arrived, excepting as to a small part thereof, which he sold to a person in good credit, and after due inquiry and care, but who has never paid for it.

LOWELL, J. A long series of careful decisions by Judge Sprague, rarely appealed from, and in no important particular varied by the

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circuit court, has settled the law of this court in respect to the rights and duties of the owners and men concerned in whaling voyages. The master and crew have no property in the oil, no voice in its disposition, no right to demand any specific portion of it, against the wish of the owners; their lays are wages, which, by consent, they may take in kind, but which in the absence of such consent, they are entitled to have paid them at the cash price in the port of delivery, as soon after the arrival of the vessel as the amount and quality can be reasonably ascertained.

Any possible hardship that this course of business may be supposed to cause to the owners, is compensated in this way: they have full power to sell in good faith enough oil to satisfy the demands of the seamen, and such a sale fixes the price, and they cannot suffer loss, or if they do not care to do that they are bound to account for the cash price only. Whether these decisions, which cover a great many particulars, not important to be mentioned now, were thought by the owners to be sufficiently favorable to them, I do not know; but they have certainly acquiesced in the greater part of them, and voyages are constantly settled by the rules so established. Some points which formerly rested on doubtful usages have now been incorporated into the contracts; such as the right to ship home oil in the course of the cruise, which appears to be a reasonable and useful modification of the agreement. Some others concerning charges to be made by the owners may still be disputable.

In the present case the defendant, at the hearing, asked leave to amend his answer by setting up a custom of the port of Boston, which is the place referred to in the articles, and is the home port of the schooner, for masters to wait until the oil is sold before receiving their wages. As the libellant was not prepared with evidence on this point, I refused to permit the amendment, excepting as laying a foundation for evidence before the assessor, if the case should go farther. Upon reflection I cannot bring myself to think that such a usage would be reasonable. The master is often poor, dependent for his support and that of his family on his earnings; the supposed usage gives him no property in the oil and no right to interfere in its disposition; the owners may often have reasons connected with their own business for putting off the sale,

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and they are sure to gain interest and expenses; and the supposed usage is altogether a one-sided affair which no court could tolerate. I shall therefore refuse to refer any such question to the assessor.

The defence besides undertakes to make out a contract by this master to wait for his lay so long as the defendant shall see fit to keep the oil, or any part of it unsold. That such a bargain might lead to a delay of more than two years and a half, this case plainly shows, and it would be very difficult to sustain such an agreement, as against the seamen, excepting upon the most plenary proof that it was entered into understandingly and for a valuable consideration. I do not remember that any of the numerous cases which deny the power of owners to incorporate unusual and onerous stipulations into their shipping articles, have applied that protection to the master, who is an agent of the owners, supposed to be a man of intelligence and capacity, and I am inclined to think that a master may, if he chooses, bind himself by a contract, which if set up as a usage would be unreasonable, or if imposed upon a crew would be oppressive.

The contract here set up, if expressed in common law terms, would be this: In consideration that the owners would give the libellant the advantage of any rise there might be in the price of the oil, he agreed not to demand his wages until the oil was sold. The parties are in direct conflict upon the question, whether such a bargain was ever made. I see no reason to doubt that the owners have acted in good faith, under a claim of right, and that they would have given the plaintiff the advantage of a rise. As oil has unfortunately fallen largely in price, this controversy was to be expected, and that is one objection to making such a bargain by parol. The burden of proving this special defence is on the defendant, and I do not think he has sustained it. Trying, as I always do, to give the utmost weight to the evidence on both sides, so far it appears to be honestly given, and looking to see a possible explanation of the apparent contradictions, I yet find it impossible to reconcile the statements of the only important witnesses, the parties to the action.

The master declares that he repeatedly asked for a settlement, and he proves that when he went on his next voyage in November,

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1868, he left a power of attorney with a friend to settle his voyage. The friend swears that he demanded a settlement, but was told by the defendant that the libellant had agreed to wait till the oil was sold. On the other hand the defendant swears that neither the libellant nor his attorney ever demanded a settlement, but that they merely asked him when the oil would be sold, and consulted with him about it.

Such a contract ought to be proved by clear and decisive evidence, because it is in derogation of the rights of the master, and the parties do not stand on a footing of entire equality. Upon the weight of the evidence, including the improbability that the owner would make a definite bargain upon a subject which he considered to be regulated by usage as matter of right, I must hold that the defence is not made out. My decree must be for the libellant, with a reference to ascertain the cash value of his lay within a reasonable time after the arrival of the vessel.

Of course the libellant has no concern with the sale on credit, for it is not pretended that his contract required him to guarantee the sales as well as to wait till they were made, and the general rule is well settled that all such sales are at the absolute risk of the owners.

Decree for the libellant.

C. T. Bonney, for the libellant.

J. L. Eldridge, for the respondent.

Ex parte CAYLUS & AL. — Re C. L. HOLBROOK.

MARCH, 1871.

It seems, that the rule laid down in *Rose v. Hart*, 8 Taunt. 499, that a deposit of goods by a contract which will result in a debt, brings the case within the mutual credit clause of the bankrupt act, so that the bailee can set off his debt against the value of the goods, is the true rule under our bankrupt law.

Where a bailee of goods had been the original vendor of them, and supposed that he had a lien and an immediate right of sale, and agreed with the bailor to hold the goods for six months longer, and not to sell within that time, except for a certain price, but that afterwards he might sell and reimburse himself, *held*, this was a valid contract whether there were an antecedent lien or not, and after bankruptcy the bailee could have the goods sold and apply the proceeds towards the payment of his debt and prove for the deficiency.

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A former course of dealing between A. and a broker, cannot be given in evidence to vary or explain a contract between A. and B., made through the same broker, if unknown to B. and not founded on a general usage of trade.

BANKRUPTCY. — The bankrupt was a clerk who had sometimes speculated in merchandise through the agency of his friends R. H. Green and Sons, merchandise brokers, of New York. On the 29th July, 1868, Messrs. Green bought for his account from Caylus, De Ruyter, & Company, importers, of New York, one hundred casks of French madder of a particular brand, to be thereafter shipped from France in the December and January following, to be delivered on the dock in New York in good order, and of prime quality, for fifteen cents per pound in gold, payable in thirty days after delivery. The bought and sold note disclosed Holbrook as the principal. The madder arrived early in 1869, and was delivered to the brokers, but was not paid for in thirty days, and had not been paid for at the date of the bankruptcy, June 28, 1870. It was then in the hands of the petitioners, Caylus, De Ruyter, & Co., the original vendors, having been consigned to them for sale in December, 1869, as presently to be stated; and since the appointment of the assignee the madder has been sold by order of court on consent of the parties, who now submitted the question whether the proceeds of sale which are less than the original price, belong to the assignee, or may be applied by the petitioners towards the payment of their debt, with leave to them to prove for the deficiency. The correspondence of the parties, and the oral evidence in the case tended to show that the goods had been delivered to Green & Co. on their arrival in New York. The petitioners offered to prove that by the course of dealing between them and the brokers, the latter were to hold the goods as agents for both parties, and to apply the proceeds of sale to the payment of their account.

LOWELL, J. I cannot admit a course of dealing between other parties, even if they were represented by the same brokers, to qualify the delivery which the contract calls for, unless it amounts to a general usage of trade, or is in some way brought home to Mr. Holbrook.

After the madder had been delivered, it was pledged by the brokers to a trust company, and the money thus raised was

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advanced to the petitioners, but not in payment of their account for the madder; and they afterwards advanced the money to Green to repay the trust company, and took the pledged goods into their own possession. Soon after this, they wrote to Holbrook, December 2, 1869, reminding him that the bills for the madder had been rendered more than eight months before, and offering if he would pay the interest and expenses and consign the goods to them for sale at a commission of two and a half per cent, to "carry" the goods for his account and risk for ninety days. They wrote that in this way they could get advances on them, &c., and closed thus: "We think this arrangement the best for all concerned, as putting this long pending matter in the way of settlement, and carrying the goods over to a time when sales may reasonably be expected to be made, and avoiding the necessity which would otherwise occur of realizing on the goods at an unfavorable moment." Upon receipt of this letter, which came through Messrs. Green & Co., as usual, Mr. Holbrook referred the matter to them, and an agreement was arrived at as appears by a letter of 31 December, 1869, from Holbrook to the petitioners, and their answer, January 3, 1870, by which the petitioners in consideration of the payment of the interest, storage, expenses, and insurance, to 31 December, and of the goods being consigned to them for sale, agreed not to sell for six months without Holbrook's consent, unless they could obtain sixteen cents a pound in gold. The letter of the petitioners accepting the terms, says that after six months they are to sell at the best price they can obtain for Holbrook's account. To this letter there was no reply. As the six months were about to expire, some negotiations were had looking to a further extension, but nothing was arranged, and a few days before the time was out Holbrook filed his petition in bankruptcy.

G. O. Shattuck & W. A. Munroe, for the petitioners. The petitioners never lost their lien as vendors; or if they did, it revived when they again obtained possession of the goods: *Bingham on Sales*, 580; *Stephens v. Wilkinson*, 2 B. & Ad. 320; *Gillard v. Brittain*, 8 M. & W. 575.

The goods having been consigned to the petitioners *for sale*, they have a right of set-off under the mutual credit clause of the bankrupt act, even if they had no lien: *Rose v. Hart*, 8 Taunt. 499;

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Naoroji v. Bank of India, L. R. 3 C. P. 444 ; *Murray v. Riggs*, 15 Johns. 591 ; *Demmon v. Boylston Bank*, 5 Cush. 194.

H. D. Hyde, for the assignees. A factor has a lien only for his advances or for general balance of account *as factor*, and not for what may be due him in some other capacity: *Houghton v. Matthews*, 3 B. & P. 485 ; 2 Kent Com. 645 ; Smith, Merc. Law, 516.

If Holbrook had chosen to revoke the agency, the petitioners could not have objected, and as the bankruptcy occurred before sale had been made of the goods, the assignee may revoke, and take them for the general creditors.

LOWELL, J. Our bankrupt law has adopted the language which had been used in former statutes for a long time, in reference to cross-demands between the assignee of a bankrupt and a creditor of the estate, that "in all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid." After some diversity of opinion, the leading case of *Rose v. Hart*, 8 Taunt. 499, appears to have been accepted as settling the law of England, that where a creditor has goods or choses in action of the bankrupt put into his hands before bankruptcy by a valid contract, by the terms of which the deposit will result in a debt, as if they are deposited for sale or collection, the case of mutual credit has arisen within the meaning of the bankrupt act ; but where there is a deposit for some other purpose, as in the leading case itself, where goods were left with a fuller to be dressed, he can claim nothing beyond such lien as the common law gives him. See *Rose v. Hart*, 2 Smith L. C. 172, and the American notes which cite cases in this country quite as liberal in favor of an equitable set-off, even when the statute is silent.

Under this rule the petitioners would have a right to set off the price of these goods against the demand of the assignee for the value of the goods, by virtue of the consignment of December, 1869, independently of any question of the revival of their lien as vendors, or of the intermediate pledge by the brokers. But this inquiry I do not pursue beyond the mere statement of a rule which seems to be indisputable, because the facts establish a right to hold the goods by the very terms of the contract. Whether the petitioners had a lien or not, it is plain that both parties thought they

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had one, and that the last agreement between them was made on that basis, the petitioners undertaking for a valuable consideration, to "carry" the madder for six months, and at the end of that time to be at liberty to sell it for the best price they could obtain, and reimburse themselves. This was accepted as a concession on their part, and to save a sacrifice; and throughout the correspondence, the talk is of "margins," and of "carrying" the goods for the benefit of Mr. Holbrook, all of which imports a right in the merchants to insist on a sale, and a holding of the goods as security for the purchase-money. I find, therefore, that the evidence clearly shows a lien by contract, whatever may have been its supposed origin, and a lien on which the parties have so acted and dealt with each other that the bankrupt and his assignee cannot now deny it. It was founded on the valuable consideration of a forbearance to sue.

Order that the petitioners have leave to apply the proceeds of sale of the madder towards the payment of their debt, and to prove for the deficiency.

Ex parte HOUGHTON & AL. — Re FORTUNE.

MARCH, 1871.

The bankrupt was sub-lessee of a shop, and was to pay a certain rent and all taxes assessed during the term; he took possession June 1, 1868, and failed and went into bankruptcy early in September, 1869. The lessors had a right to enter and terminate the tenancy in case of the lessee's bankruptcy or breach of covenant, but without prejudice to any remedy for arrears of rent or preceding breach of covenant. They entered soon after the bankruptcy and relet the premises at a loss.

Held, 1. The loss of rent accruing after the bankruptcy cannot be proved either as a debt or as unliquidated damages.

2. The lessors terminated the bankrupt's estate by their entry, and cannot prove for the loss sustained by reletting at a lower rent.
3. They may prove for the arrears of rent and for any damages sustained by a breach of the covenant to repair.
4. The taxes are a part of the rent and not a privileged debt.
5. By the lease the bankrupt was bound to pay the taxes of 1869, and parol evidence is not admissible to prove that the parties understood he was to pay those of both years.

THE petitioners hold a long lease of a shop on Washington street, Boston, and on the thirtieth day of May, 1868, they under-

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let the shop to James Fortune, the bankrupt, for eight years and ten months from the first day of the next June, being two days less than their own term, at a rent which was payable monthly and very largely in advance of what they paid. Fortune covenanted to pay the rent, and all taxes which should be assessed on said premises during said term, to make no alterations without the written consent of the petitioners, and to keep the premises in as good order as at the beginning of the term, reasonable use, &c., excepted. The petition in bankruptcy was filed June 9, 1869. The petitioners alleged a breach of all these covenants, and have proved for all arrears of rent, without objection. They took possession of the premises early in September, 1869, on the day on which they saw a notice in the newspaper of the adjudication in bankruptcy, and say that they found the shop injured by alterations to the extent of five hundred dollars. They have since relet the shop at a reduced rent, and they asked to have the damages suffered by them in the reletting of the estate as well as the damage by the alterations assessed by the court or by a jury. They also offered to prove as preferred debts the city and State taxes assessed on the premises by the city of Boston for the years 1868 and 1869, which were assessed to the owner of the estate, and paid by the petitioners as required by the terms of their lease from the owner.

At a hearing before the court the facts above mentioned were proved, and it further appeared that the lease contained this clause: "Provided also, and these presents are upon condition, that if the lessee or his representatives or assigns do or shall neglect or fail to perform and observe any or either of the covenants . . . or if the lessee shall be declared bankrupt or insolvent according to law, or if any assignment shall be made of his property for the benefit of creditors, then, and in either of the said cases, the lessors, or those having their estate in said premises may, immediately, or at any time thereafter, and whilst such neglect or default continues, and without further notice or demand, enter into and upon the said premises, or any part thereof, in the name of the whole, and repossess the same, as of their former estate, and expel the lessee, &c. . . without prejudice to any remedies which might otherwise be used for arrears of rent or preceding

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breach of covenant, and that upon entry, as aforesaid, the said term shall cease and be ended."

E. Avery, for the petitioners. We have suffered large damages by being obliged to re-enter and to let at a less rent. The case is therefore within the terms of the act, unliquidated damages arising out of any contract or promise. We did not enter because of the bankruptcy, but to protect ourselves, the bankrupt having removed his goods and left the shop just before he filed his petition, and in effect abandoned his lease.

B. F. Brooks, for the assignees. The statute expressly says that rent may be proved up to the time of the bankruptcy, and this is a clear implication that future accruing rent cannot be proved. It is no debt, contingent or otherwise, as has been often decided: *Auriol v. Mills*, 4 T. R. 94; *Hendricks v. Judah*, 2 Caines, R. 25; *Lansing v. Prendergast*, 9 Johns. 127; *Savory v. Stocking*, 4 Cush. 607; *Bosler v. Kuhn*, 8 Watts & S. 183.

LOWELL, J. The most important question is, whether the petitioners can prove for the damages suffered by them in reletting the premises. The earlier law of England, which we have adopted in this country, was that the assignees of a bankrupt have a reasonable time to elect whether they will assume a lease which they find in his possession, and if they do not take it the bankrupt retains the term on precisely the same footing as before, with the right to occupy, and the obligation to pay rent; if they do take it he is released as in all other cases of valid assignment, from all liability excepting on his covenants, and from these he is not discharged in any event: *Henley on Bankruptcy* (3d ed.), 237; *Auriol v. Mills*, 4 T. R. 94; *Copeland v. Stevens*, 1 B. & A. 593; *Tuck v. Fyson*, 6 Bing. 321; *Robson on Bankruptcy*, 328. This rule was long since modified in England by statutes 49 Geo. 3, ch. 121, § 19, and 6 Geo. 4, ch. 16, § 75, by which the bankrupt was released from his covenants if either the assignee accepted the lease, or the bankrupt himself surrendered it to his lessor within fourteen days after notice that the assignee had declined. This remained the law by re-enactment in the several revisions of the bankrupt acts down to the latest in 1869, 32 & 33 Vict. ch. 71, § 23, which authorizes an assignee to disclaim any onerous property or contract, and deprives the bankrupt of all interest therein

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whether the assignee disclaims or not, and gives any person "injured by the operation of this section" the right to prove the amount of his injury as a debt under the bankruptcy. This is the first legislative recognition that I have found of any debt of the character now sought to be proved, and the petitioners have failed to discover any judicial determination of a similar right. The American authorities follow the line of reasoning and decision of the earlier English cases, and hold that a lessor has no provable debt, contingent or otherwise, for the reason that rent accrues from time to time, and is not and cannot be due *in solido* beforehand, since it depends on occupation from time to time.

Leaving out of view for the moment the peculiar clause of this lease relating to bankruptcy, which the petitioners say they have never acted on, and overlooking the fact of their re-entry, how did the bankruptcy affect this lease? The assignees did not assume the lease, and consequently the original parties stand simply as landlord and tenant. If the bankrupt can find means to pay his rent, or can find a purchaser for the lease, no one is injured; if he cannot, the lessors may re-enter. Where are the unliquidated damages to be assessed against the estate of the bankrupt? In the very useful and accurate work of Mr. Taylor on Landlord and Tenant, § 457, it is suggested that the question whether future rent can be proved as a debt in bankruptcy must depend on the particular language of the several statutes, and that under the broad authority to prove contingent debts contained in some of these acts, such proof might, perhaps, be made. The latter part of the suggestion is not supported by any decision, and seems rather a prophecy of the English "bankruptcy act" of 1869 than a gloss upon any which had preceded it. The United States act of 1841 gave very full power to prove contingent debts and even to have them valued, but future rent was held not to be within its terms: *Bosler v. Kuhn*, 8 Watts & S. 183; *Savory v. Stocking*, 4 Cush. 607. There is, no doubt, strong reason for passing such a law, but the existing law does not cover the case. It is not uncommon now for leases to contain a provision that in case of breach the lessor may enter and relet the estate at the expense and risk of the lessee and charge him with the deficiency. Under such a clause a lessor might well have the right to prove for the full

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amount of the damages which should be ascertained by such re-letting. Such a case would be analogous to that arising under the bankruptcy of the Metallic Compression Casting Company, which had contracted in writing with a skilled workman to employ him for a fixed time at a fixed rate of wages, and had discharged him when they stopped payment. I ruled to the jury that the workman had his election to sue for his wages from time to time, or to proceed at once for unliquidated damages, and when the company were in bankruptcy might have his damages assessed under § 19, and prove for the amount of the verdict; a ruling which was accepted to, but the case was not carried further, and I see no occasion to doubt the soundness of the instruction. But rent stands on a very different foundation, because there is no right of action at the time of the bankruptcy, excepting for the arrears.

There is another sufficient answer to this part of the case. The petitioners have availed themselves of the power of re-entry, and have put an end to the estate of the bankrupt and repossessed themselves "as of their former estate." Such an entry is an eviction, and puts an end to the rent by operation of law, and by the terms of this lease, though by law and by contract they do not thereby waive any existing right of action for rent in arrear, or "preceding breach of covenant." This is all that their disclaimer amounted to, and if it were not, they cannot be heard after they have entered and exercised all acts of ownership and relet the premises, to say that they have not entered as lessors nor to repossess the premises, but merely as agents of the lessee, and to save the estate from waste. We have already seen that this lease confers no power or agency upon the petitioners in this matter, and their entry must be taken to be according to their right. It is immaterial whether the bankruptcy was the breach for which they entered; it is enough that they have entered lawfully, and have ended the term and the rent together. If the lease had been valuable, and they had relet the shop for an increased rent, I do not see how the assignees could have made any valid objection to the re-entry.

The petitioners have not waived any right they had before entry, and may prove for such damages as they have suffered by the changes made in the stairway and shelves. The case was

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heard by the register, Mr. Ellis, whose rulings were in accordance with my views in every particular. I find on this point that he refrains from assessing the damages, and refers the whole matter to the court. It was said at the argument that the register had once assessed these damages at seventy-six dollars, after a full hearing. If so he must have reviewed his decision, for he reports a mere reference to the court, and by consent of the parties omits the evidence. Upon the proofs before me I consider fifty dollars to be ample damages, and assess the same accordingly.

The petitioners are entitled to prove for one year's taxes. Any argument which shall establish their right to prove for those of 1868 will be equally strong to prevent the proof for 1869. The covenant is to pay all taxes assessed during the term, and taxes are assessed as of the first day of May. The tenancy began June 1, 1868, and ended about September 1, 1869. It seems to me that under this covenant the lessee was bound to pay the taxes for 1869, and not those for 1868, and the former having been due in theory of law at the time of the bankruptcy, though not payable until afterwards, may be proved. This debt is not entitled to preference, because as between these parties it rested in contract merely, and was to all intents and purposes a part of the rent. The taxes were not assessed to the bankrupt nor to the petitioners, and the city had no right to prove them in the bankruptcy. There is no right of preference or lien to which the petitioners can be subrogated, but only a right of action over against Fortune, if he should neglect to pay the taxes to the petitioners on demand after they had themselves paid them. Parol evidence was offered to show that both parties understood that the taxes of 1868 were to be paid by the tenant, but such evidence was inadmissible, and was rightly taken by the register only *de bene*. There was no offer to show a new contract by parol founded on a new consideration, but merely to explain the lease.

Let orders be drawn in accordance with this opinion.

Re Barnes.

Re H. F. BARNES.

MARCH, 1871.

A power of attorney to prove a debt in bankruptcy need not be acknowledged though drawn according to form twenty-six.

A creditor cannot prove by an attorney testifying upon information and belief, unless the creditor is prevented from giving the affidavit as provided by § 22.

LOWELL, J. I understand two questions to be certified: 1. Whether a power of attorney drawn up according to form No. 26, of the general orders in bankruptcy, must be acknowledged? 2. Whether under such a power the attorney may make oath to the deposition in proof of his principal's debt, without showing that the creditor is absent from the United States, or prevented by some other good cause from testifying? I answer both questions in the negative. 1. I know of no law which requires powers of attorney of this sort to be acknowledged, and I can see no possible reason why any such law should ever be passed. It is true that form 26 of a letter of attorney to represent a creditor has a foot-note to the effect that it *may* be acknowledged before a judge, &c., but I suppose the supreme court would have prescribed some rule upon the subject if they had intended to make such action obligatory. In the form No. 14, which would have been sufficient for the purposes of this case, there is no such foot-note, and it has been decided that no acknowledgment is necessary where that form is used: *Re Powell*, 2 B. R. 17. I understand that the forms are largely advisory; any duly executed writing which expresses the essential fact of the appointment of the attorney and the powers confided to him must be respected by the judge or register. Whether the foot-note in question was ordered by the supreme court to be appended to the form I do not know, but if it was, it must have been in anticipation that some question of acknowledgment might arise under the municipal law of some particular State, and it is therefore pointed out that in case of acknowledgment it may be before certain officers named. Section 23 of the act provides that any creditor may act at all meetings by his duly accredited attorney, and I cannot believe that the foot-note to form 26 is a rule that the letter appointing such an attorney must be acknowledged, nor even that it must be a deed.

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The other question must also be answered in the negative. Section 23, just cited, refers to acts by creditors who have proved their debts, or made the proper deposition to prove them, and provides that all such acts may be performed by attorney; but section 22 shows when a debt may be sworn to by attorney; and that is when the creditor is absent from the United States, or is prevented by some other good cause from testifying. This cause need not be stated in the letter of attorney, but is to be proved to the satisfaction of the judge or register before whom the debt is offered for proof. If the attorney be acquainted with the facts of his own knowledge, it has been held that he may testify without proving the creditor is absent, &c.; but I am speaking of one who proposes to depose only upon information and belief. The law requires the oath of some person having knowledge, and the creditor himself is presumed to have it, and unless he is absent or in some way prevented from testifying, no one can do so for him, unless it be a person having actual knowledge.

Certificate accordingly to Mr. Conkey, the register.

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APRIL, 1871.

An insolvent trader may mortgage his stock and tools for present and future advances with the actual and honest intent to raise money to continue his business.

It seems, that such a mortgage would not necessarily be fraudulent though a part of the consideration were an existing debt.

Where the honest intent was clear, and the mortgage was made for past as well as future advances, but mainly for the latter, and it appeared that the past advances were already secured upon property reasonably believed to be fully adequate, the mortgage was upheld although it turned out that the former security had not been quite sufficient.

A chattel mortgage of machinery and other things which would be trade fixtures as between landlord and tenant, will give the mortgagee a valid lien as against the assignee in bankruptcy, although as against a prior mortgagee of the realty the fixtures would be real estate, if it appears that such prior mortgagee makes no claim to the fixtures.

Where a mortgage was given to indemnify the mortgagee for his advances, and he lent his acceptances to the mortgagor, and after the bankruptcy of the latter bought up the paper at a discount, *held*, that he could charge against the mortgaged property only what he had paid in cash to take up the acceptances.

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Where a mortgage is made in Massachusetts of an unfinished locomotive, the mortgagee will hold the additions afterwards made to the article by the mortgagor before his bankruptcy, by accretion; but a mere mortgage of materials would not, it seems, give him the right to new articles manufactured from those materials.

A mortgage given in pursuance of a parol agreement to give security, if required, will not hold against the assignee in bankruptcy, if the act of giving the mortgage would have been a preference at the time it was given, but for the agreement.

Whether or not a written promise to convey certain definite property as security, given when the debt was contracted, would save the mortgage afterwards given from being a preference, *quære*?

Advances made in good faith while a mortgage is being prepared, and as part of the money agreed to be secured by it, will be protected, though there should be a change of the debtor's circumstances after the money was advanced, and before the deed was delivered.

LOWELL, J. The petitioner, as trustee for himself and his partner holds a mortgage upon nearly all the stock, tools, and other movable property of the bankrupts, and it was to be expected that the general creditors should look upon the transaction with suspicion, and inquire carefully into its consideration. The advances were all made after the nineteenth of September; the mortgage was made on the seventeenth of October, and McKay & Aldus stopped payment in the latter part of November of the same year, 1868. A mortgage of all the property of a trader, or of so much as will make him insolvent, when given for a pre-existing debt is, by the law of England, conclusively presumed to be a fraud upon the bankrupt act: *Worseley v. DeMattos*, 1 Burr. 467; *Dutton v. Morrison*, 17 Ves. 199; *Lindon v. Sharp*, 6 M. & G. 895; *Stewart v. Moody*, 1 C. M. & R. 777; and although our law does not deal in conclusive presumptions, yet the result is much the same, for it would be almost impossible to explain away such an apparent preference. It is not so with security given for present or future advances, which if made in good faith and without notice of any fraudulent intent on the part of the trader, cannot be acts of bankruptcy, for the reason that a fair exchange of equivalents injures no one. Unless, therefore, the mortgagee is party or privy to some fraud or preference (as in the case of *Ex parte Mendell, Re Butler, supra*, 506), he may hold his security against the assignee however insolvent the mortgagor may have been at the time: *Hutton v. Cruttwell*, 1 Ellis & B. 15; *Bittlestone v. Cooke*, 6 Ellis & B. 296; *Harris v. Rickett*, 4 H. & N. 1. In cases of a mixed character, where security for a past debt is coupled with a further ad-

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vance, the law of England is thus stated by the latest text writer : " It does not appear to be formally settled whether the assignment by a debtor of the whole of his effects, in consideration partly of an existing debt and partly of an advance, is or is not an act of bankruptcy." After citing the authorities on both sides, he adds : " The weight of authority would seem to be in favor of a transaction of this sort not being an act of bankruptcy where the advance is made *bond fide* to enable the debtor to meet his engagements and carry on his business. Such an act may be and in fact often is the wisest course a trader can take to promote the interest of his creditors." Robson on Bankruptcy, 110, citing *Re Colemere*, L. R. 1 Ch. Ap. 128 ; *Allen v. Bonnett*, 21 L. J. N. S. 309.

I am inclined to think that the test proposed by Mr. Robson is the true one under our law. It is not every insolvent who can be made bankrupt by his creditors, though every insolvent can petition in his own behalf. Congress has carefully refrained from saying that a state of insolvency is equivalent to an act of bankruptcy, though hopeless insolvency as proved by certain tests is so. For instance, a trader whose paper lies over for fourteen days has become bankrupt ; but if his credit is sufficient to enable him to obtain a renewal within thirteen days, he cannot be proceeded against as a bankrupt on that ground. The question being in each case whether there was an intent to prefer, there may be many in which the evidence of a real and honest intention not to stop payment may make valid a security which was partly given for money previously advanced, if coupled with sufficient present advantages to the debtor to relieve the case of any fraudulent appearance. And there may even be cases where the purpose and expectation to keep on are so manifest that no intent to prefer can be found, though the insolvency was well known to both parties.

The present case, however, is not one which calls for any critical examination into the boundary lines of the domain of preference. The history of the dealings between these parties from the 19th of September onward fails to show any intended fraud on the act. Indeed I understand it to be admitted that there was no such intent at first ; but the assignees think they can discover a point where good faith ends and preference begins. They argue that the lenders advanced more money than they had intended or

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more than they had security for, and when they found this out determined to take the mortgage at any risk, to cover their advances and secure themselves if possible. The evidence lends no aid to this theory, but sets out a continuing course of dealing in which loans and security were contemporaneous throughout. I find it to be fully established that the firm of McKay & Aldus hoped and intended to continue their business, and made the mortgage with that view, and that their representations to the petitioner were calculated to make him believe not only that such was their hope, but that it was one that might be reasonably entertained. A mortgage made under such circumstances and for such a purpose cannot be successfully assailed if it is given for present and future advances only. It is argued, however, very strongly that this mortgage was intended mainly for past loans. No doubt it reads so on its face; but the proof is that many of the acceptances recited in it, although some of them are dated back a few days, so that all should not fall due at once, were given on the credit of this mortgage, and were not in fact delivered until the security itself was delivered. Our law of preference sets aside all payments and conveyances made with intent to prefer one creditor over the rest, whatever motives may have been brought to bear on the debtor by threat, entreaty, or legal coercion. And with us it is perhaps not the law, as it is in England, that a general promise of security given at the time the debt is contracted, may be executed after the debtor has become insolvent. Such a promise will not save the act from being a preference, if it would have been one without the promise. This, I have more than once ruled to the jury, and there are reported cases for it: *Arnold v. Maynard*, 2 Story, 349; *Graham v. Stark*, 3 B. R. 92; *Blodgett v. Hildreth*, 11 Cush. 311. I have been accustomed to say that such an agreement merely amounts to an agreement to give a preference if one should become necessary. But I have always ruled that security fairly given, as part of the same transaction as the loan, could not be invalidated by a change of the borrower's situation *re infecta*, as if the money were advanced while the mortgage was in course of preparation, and the debtor fails in the mean time. I have not seen or known of any case which brings up the somewhat nicer question, argued here,

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whether specific and definite security, unconditionally stipulated for in writing, may be given after a lapse of time and a change of circumstances. This may depend on whether the contract is one that a court of law or equity would enforce *in invitum*; for I apprehend and have often decided subject to a correction that has not yet been made, that the assignee stands no better than the bankrupt in all matters of title, excepting where there is actual or constructive fraud. The petitioner insists that the letter of McKay & Aldus to him, of 21 September, if acted on and if the money was advanced on the faith of it, would give him an equitable lien which would prevail against the assignee. I shall not examine the point of law, because the facts negative any illegal intent, so that I must uphold the mortgage whether it was a mere continuation of the written promise or was a new contract. The petitioner advanced money from time to time and took security for each advance, and when the mortgage was ordered and was being drawn up, he had what appeared to be ample security for his then existing advances. It has turned out that one piece of property which he then held is of much less value than was supposed, and one other of somewhat less value, but there was no reason to suspect this at the time, and the difference even now is but trifling compared with the whole amount at issue, and I cannot find as a fact that this mortgage was given with any intent to prefer, or with any fear that the existing advances were not amply secured. The conduct of both parties before and after and at the time show as clearly as does all the rest of the evidence that the mortgage was intended for a legitimate business transaction, having relation to the continuance and not the stopping of the trade, and that the advances made at and after the time were the sole moving consideration for the mortgage. Under these circumstances I do not feel justified in avoiding the mortgage even to the extent of the few thousand dollars that are said not to have been already fully secured of the advances made in September. I do not undertake to recapitulate evidence, but I may say here that considering the dates, I doubt whether there is even a small balance of the earlier advances left to be paid out of the property embraced in the mortgage; because I think it will be found that acceptances for at least four or five thousand dollars were advanced

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while the mortgage was in preparation, and these would be protected by it if such was the agreement of the parties when they were given.

The mortgage being valid, it becomes a question of importance to the parties to decide what property is lawfully conveyed by it. It purports to grant "all the lathes, planers, drills, shafting, belting, pulleys, steam engines, boilers, and all the other machinery, tools, implements, furniture, locomotives, and other machinery and machines, whether finished, &c., and all the iron, steel, and other materials," on or about the land and buildings of the mortgagors' works at East Boston. There was an earlier mortgage on the land held by the Lowell Institution for Savings, to secure the payment of \$60,000. The assignees maintained and still maintain that many of the things claimed by the petitioner under his conveyance were in fact a part of the realty, and held by the savings bank. They sold the equity of redemption of the real estate, after due notice, and after making a written agreement with the petitioner that the sale should not prejudice his rights, but that the disputed fixtures should be considered as worth their appraised value so far as the present controversy is concerned. The equity brought a large sum over the incumbrance of the savings bank. It is not seriously questioned by either party that certain steam engines, boilers, belting, and shafting, at least, are of the character of trade fixtures, which if put in by a tenant for years or at will, might be removed by him during his term: *Wall v. Hinds*, 4 Gray, 270; *Whiting v. Brastow*, 4 Pick. 310; *Gaffield v. Hapgood*, 17 Pick. 192. And it is no less certain that as against the savings bank, holding a prior mortgage of the land, they became a part of the realty, which neither the mortgagors nor any one claiming under them could remove: *Winslow v. Merchants' Ins. Co.*, 4 Met. 306; *Butler v. Page*, 7 Met. 40; *Bliss v. Whitney*, 9 Allen, 114; *Lynde v. Rowe*, 12 Allen, 100; *Richardson v. Copeland*, 6 Gray, 586. The petitioner contends, and I think with reason, that the assignees having received for the equity of redemption a sum equal to the value of these fixtures must be considered to have received it for the fixtures clear of the mortgage. This distinguishes the case from *Richardson v. Copeland*, where the mortgagees of the realty applied to the insolvent court to have

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the estate sold, and for leave to prove for any deficiency, so that the defendant in that case derived title under the mortgagees, and is so treated throughout the case. Here the first mortgagee has no interest in the controversy; the assignees do not hold under him, and cannot set up his title. The rights of these parties are the same as if the estate had been sold free of all incumbrances, and the first mortgagee had been paid off, and a surplus was remaining in the registry of the court to be paid to such persons as could make a title. The late case of *Hunt v. Bay State Iron Co.*, 97 Mass. 279, decides that by an agreement between the vendors of iron rails and a railway company, the rails may remain the chattels of the vendor, after they are affixed to the realty; that the vendor's property in them cannot be asserted against prior incumbrancers, nor against subsequent *bond fide* incumbrancers or purchasers without notice, but will hold good against purchasers with notice. That case seems to me decisive of this, because an assignee in bankruptcy takes with notice: *Mitchell v. Winslow*, 2 Story, 630; *Winsor v. McLellan*, ib. 492; *Mitford v. Mitford*, 9 Ves. 87; *Re Atkinson*, 2 De G. M. & G. 140; *Re Barr's Trusts*, 4 Kay & J. 219.

It is argued on behalf of the assignees that a contract to treat fixtures as chattels, whether it be express or implied, must be made before they are actually affixed to the realty; and for this some remarks of Dewey, J., delivering the opinion of the court in *Gibbs v. Esty*, 15 Gray, 587, are quoted. But those remarks appear to be intended only for parol agreements concerning buildings and fixtures annexed by a stranger, and to mean that such a parol agreement or license cannot change real into personal estate after its character has been once established. So if the question here were between the petitioner and the savings bank, no mere oral license of the latter, given after the engines were set up, could be shown. Growing wood or crops may be sold by parol, with a parol license to sever them; and I am much inclined to think that trade fixtures might be. At all events there can be no doubt that the owner can in writing and for a valuable consideration convey severable chattels in such a way as to bind himself and his assignee in bankruptcy by estoppel at least. The discussions of the question whether fixtures have passed by a deed or

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mortgage all assume, and many of them express that if the owner chooses to except the fixtures out of his conveyance of the fee, he may lawfully do so. Two or three decisions in England, which are thought to state the law too strongly against mortgagees, are yet supported on the ground that the particular conveyances may be construed as including or excluding the fixtures as the case may be. See *Waterfall v. Penistone*, 6 E. & B. 876; *Trappes v. Harter*, 2 C. & M. 153; *Cullwick v. Swindell*, L. R. 3 Eq. 249; *Colgrave v. Dias Santos*, 2 B. & C. 76; *Harlan v. Harlan*, 20 Penn. State, 303. So in *Richardson v. Copeland*, 6 Gray, 538, the chief justice says: "No title to these articles passed to the mortgagees which they could assert against a third party," referring, no doubt, to a prior incumbrancer or an innocent purchaser of the land, as in *Hunt v. The Bay State Iron Co.*, and as the defendant in the case then before the court seems to have been in effect. The assignee is not a third party, in this sense.

By the insolvent law of Massachusetts the assignee took whatever any creditor might have taken on execution against the insolvent, and this included some things which do not pass to an assignee in bankruptcy, such as real estate which had been attached as the property of the bankrupt and afterwards sold by him subject to the incumbrance.

I am of opinion that the conveyance to the petitioner, under these circumstances, no question arising between him and the earlier mortgagee of the realty, passed a title which is good against the assignees. Some of the articles mentioned in the argument do not appear to be described in the petitioner's mortgage, and do not pass. Such are the gas, steam, air, and water pipes, and the benches and closets, unless they are tools, implements, or machinery, and it hardly seems to me that they are either of these. I do not understand that it is important to settle each particular of this kind, because the money realized is sufficient to pay the mortgage debt in full if the principal fixtures are held to be included.

I agree with the assignees that any saving that the petitioner has made by buying up his own acceptances must be credited to the estate, because the mortgage was for indemnity only, and not for a sum certain; and if he could have got rid of the acceptances without payment there would have been a right to redeem on repayment of the cash advances.

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If any locomotives were in course of manufacture when the mortgage was given, the additions to them would pass by accretion up to the time of the bankruptcy, even if the materials were not included in the mortgage, which I suppose most of them were. But I apprehend that a mere mortgage of materials would not convey new articles made out of those materials. See *Harding v. Coburn*, 12 Met. 333.

Let a decree be drawn in conformity with this opinion.

B. F. Thomas & J. D. Ball, for the petitioner.

T. K. Lothrop, for the assignees.

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APRIL, 1871.

A libel brought in the United States against a British vessel for wages, by British sailors shipped for a voyage ending in a home port, will not be entertained, against the protest of the British consul, in the absence of special circumstances, such as a clear deviation from the voyage described in the articles, cruelty, or the breaking up of the voyage, although the court may doubt the validity of the articles.

LIBEL by the crew of the British ship Becherdass Ambaidass, alleging that they shipped at Liverpool in November, 1869, for a voyage to the East Indies, and thence to Boston; that the ship arrived in safety at this port in February, 1871, where the libellants' services terminated, and they became entitled to their wages as fully stated in their schedule. H. B. M. acting consul at Boston protested against the court taking jurisdiction of this cause, for the reasons that the libellants signed shipping articles in a usual form approved and used in the government shipping offices, and for a voyage not yet ended; that by the Merchant Shipping Act of Great Britain, seamen are not permitted to sue in foreign ports unless duly discharged there, or so ill-treated as to be put in fear of their lives; that neither alternative applies to these libellants, and that it will be for the advantage of both parties to remit them to their home tribunals. The master by his answer reiterates the same grounds of objection, and adds a description of the voyage from

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the articles, as follows: "From Liverpool to Bombay, and any ports and places in the Indian, Pacific, and Atlantic Oceans, and China and Eastern seas, thence to a port for orders, and to the Continent if required, and back to a port of final discharge in the United Kingdom, term not to exceed three years." The shipping articles on inspection agreed with the master's answer, and the libellants admitted that their description of the voyage in the libel was not the true one, and prayed leave to amend by alleging that they were brought to Boston against their will. No objection was made to allowing such an amendment; but none such was made and sworn to.

LOWELL, J. The law is well settled in England and America, that courts of admiralty have jurisdiction of suits by foreign seamen for their wages against a foreign ship, or her master or owners who are found within the territorial limits of the jurisdiction of the court. As early as 1795, Judge Peters thus stated his practice: "I have avoided taking cognizance, as much as possible, of disputes in which foreign ships and seamen are concerned. I have in general left them to settle their differences before their own tribunals. On several occasions I have seen it a part of the contract that the mariners should not sue in any other than their own courts; and I consider such a contract lawful," &c. He adds, that where the voyage is ended or broken up here, and no treaty or compact prescribes the mode of proceeding, he had permitted such suits to be brought: *The Catharina*, 1 Pet. Adm. 104. He makes a very similar statement in *The Försöket*, ib. 197. And there is no substantial change since that time. See *The Jerusalem*, 2 Gallison, 191; *Taylor v. Caryl*, 20 How. 611, per Taney, C. J.; *The Maggie Hammond*, 9 Wallace, 452, per Clifford, J.

These three cases do not decide the very point, but they contain *dicta* of great weight, and the decisions are in conformity with them: *Patch v. Marshall*, 1 Curtis, C. C. 452; *The Gazelle*, 1 Sprague, 378; *The Havana*, ib. 402; *Davis v. Leslie*, Abbott, Adm. 128; *Gonzales v. Minor*, 2 Wallace, Jr. 348; and there are many similar cases in which the rule is shown to be that the admiralty court has jurisdiction, but has a discretion whether to exercise it or not. It is not possible, of course, to lay down a precise rule to govern even the sound and judicial discretion of a

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court in future cases. Those in which actions have been maintained, against objection by the defendants or claimants (leaving out of view for the present the protest of the consul or minister), are where the voyage ends here by its own terms, and the wages are due here; where it has been wholly broken up by a sale of the ship, whether voluntarily or under legal process; where the ship is so unseaworthy that the crew are not bound to go in her; where they have been forced to leave her by the cruelty of the master.

It has been doubted whether a seaman discharged here by his own consent, should be permitted to sue, and whether a deviation by the master would be good ground for taking jurisdiction. On this last point, see *Moran v. Baudin*, 2 Pet. Adm. 415; *The St. Oloff*, ib. 428, for, and *Davis v. Leslie*, Abbott, Adm. 134, and *Bucker v. Klorkgeter*, ib. 409, against, suits being sustained, the latter being *dicta* by Judge Betts, in which he expresses the opinion that the cases in Peters are not well decided. His ground is, that the very question of deviation may present all the difficulties of ascertaining the foreign law and applying it to the contract that induce the courts to decline the jurisdiction of questions arising during the course of a still unfinished voyage. My own opinion is, that a plain departure from an admitted voyage absolves the crew from their engagement by the general maritime law, and authorizes them to leave the vessel at any port where the only inconvenience to the master will arise from the necessity of hiring a new crew, even at higher wages; and that the decision in the former of the two cases cited from 2 Peters, where it is shown that the crew had been taken on voyages they had never agreed for, was clearly right. Such seems to be the opinion of Mr. Parsons, 2 Parsons on Shipping, 227, and Judge Betts's *dicta* must be taken, not as announcing any general rule, but rather as suggesting important exceptions to a sound rule. There are such exceptions no doubt to any rule that may be attempted to be made. A seaman discharged here may yet have bound himself by a valid contract not to sue here; or we may be bound by treaty not to entertain the suit; or an offer may be made to return destitute seamen to their home, which the court may think they ought to accept, &c. Subject to such exceptions, I consider deviation

may be a ground for discharging the crew and ordering their wages to be paid to them, and this upon plain grounds of justice of universal authority.

This is not a case of deviation, strictly so called. The crew in their sworn libel say they were to come to Boston, and that the voyage was to end here. It is admitted now that the voyage was not to end here, and it is said, though not verified by oath, that they were brought here against their will. If this were so, the men must certainly have known it when they filed their libel, and should have alleged it, so as to put it in issue. As the case stands, I cannot take this fact for granted. The voyage described in the articles is broad enough to include Boston within its terms, and the contract seems to have been fully read and explained to the crew, and I understand the real objection relied on by the libellants is, that the articles are void for uncertainty. That is a point which has often arisen in this court; and, so far as our own statute is concerned, it is settled that such a description is too vague. This is not denied by the claimant, nor does he hesitate to admit that the decisions of the high court of admiralty, so far as any such have been reported, seem to agree very nearly with the American cases; still he insists that I cannot know the English law, and that he ought to have the right to take evidence in England concerning the present law and practice there, if I take jurisdiction at all.

Besides these considerations, there is the protest of H. B. M. acting consul, which affirms the validity of the articles, and protests that the court ought not to take jurisdiction. Several of the authorities above cited refer to the consent or dissent of the representative of the foreign government as being an important fact, but precisely what weight should be given to it is not defined. Judge Sprague, in *The Bloomer*, cited 2 Parsons on Shipping, 229, note 2, says: "The usual course in the case of a libel by a foreign seaman against his vessel, is to direct the clerk to inform the consul of the government of the pendency of the suit, that he may take such notice of it as he thinks proper; and unless there were strong circumstances in the case, the court would not proceed *in rem* against a foreign vessel, without the assent of the commercial representative here of the foreign government of the country

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where she belonged." What circumstances would be strong enough to induce action, notwithstanding such a protest, is not stated. Judge Peters appears to have found such circumstances in *The St. Oloff*, 2 Pet. Adm. 428, where there had been both cruelty and deviation. So did Mr. Justice Curtis, in *Patch v. Marshall*, 1 Curtis, C. C. 452, where the defendant appeared to be domiciled in Massachusetts, and the voyage was ended there. In a late case in England it has been decided in conformity with the practice in both countries, that the protest of the foreign consul could not bar the jurisdiction; but that it ought to be respectfully considered and weighed together with the other facts and circumstances upon which the sound discretion of the court must be exercised: *The Nina*, L. R. 2 P. C. 38; see, too, *The Golubchick*, 1 W. Rob. 143; *The Milford*, Swabey, 362; *The Herzogin Marie*, 1 Lush. 292.

The practice pointed out by Judge Sprague, which agrees entirely with the English practice as shown by these cases, was not followed in this case, and the consul was not notified before the warrant issued; and for the sufficient reason that the libel says nothing about the vessel being foreign, but states simply the case of a voyage ending here, the ship earning freight, and the seamen entitled to their wages; and not only so, but it invokes the immediate action of the court on the ground that the ship was about to proceed to sea within ten days, an allegation made under the statute of 1790, 1 Stats. 134, which is wholly inapplicable to the case of a British crew shipped in England, as these men are now admitted to have been. A libel so framed in total disregard of the truth of the case is an abuse of the process of the court, and the costs which have resulted from it will justly fall on the libellants if it turns out that no warrant ought to have been granted.

And my opinion is, that justice does not require me to take jurisdiction against the protest of the consul. That objection has weight as showing the opinion of the person who is intrusted with the care of British seamen, that there is no such hardship in this case as required the libellants to be paid here rather than at home. His opinion of the law too must have some weight, because he is in a position to know and act upon it often. Nor can I find in the case any of the strong circumstances such as Judge Sprague refers

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to, as requiring the protest to be disregarded. The libellants do not appear to have been brought here against their will, and the master professes himself ready to carry them home. The time for which they shipped has not run out, and no reason is given, excepting what under the circumstances of this case may fairly be called the technical one, that their contract is null. It is the policy of all maritime countries to discourage the discharge of their seamen in foreign ports, and if the master undertook to discharge these men here against their will, he would be guilty of a misdemeanor by the terms of the Merchant Shipping Act. They say it is in their election to be discharged. If this be so, yet there is no reason given excepting the strict right, and that is precisely what a court of admiralty does not feel bound to enforce without further reasons. Reserving, therefore, an opinion upon any state of facts not now before me, I must say that I do not find here any good cause for taking jurisdiction.

One of the difficulties in the operation of the well-established course of practice is, that we are obliged to try the case before we can ascertain whether it ought to be tried or not, and I find that difficulty somewhat embarrassing here, for the facts may not have been fully developed in the short hearing already had. I shall retain the libel until the sincerity of the master's professed readiness to take back the men has been ascertained; but if the facts turn out to be as they now appear, I shall not exercise jurisdiction further.

Whether I shall do so in any event, unless one or more of the crew shall appear to have been discharged with the master's consent, I do not decide. But in such a case as I have sometimes seen, of a master inducing a crew to desert, and then setting up the act in bar of their wages, his consent to discharge them might be presumed.

G. O. Shattuck and O. W. Holmes, Jr., for the claimant.

C. G. Thomas, for the libellants.

NOTE.—In the case of the *Robert Ritson*, decided soon after the *Becherdass Ambaidass*, it was admitted that the libellants had left the port before the ship, which afterwards proceeded to complete the voyage described in the articles. There was, therefore, no offer to take back the men, although the master had been willing to do so until they went away. The facts were in other respects like those in the principal case, and a similar protest was filed by the acting consul. The court dismissed the libel.

SHEARMAN & AL. v. BINGHAM & AL.

APRIL, 1871.

The district courts of the United States in a district other than that in which the proceedings in bankruptcy are pending have no jurisdiction of suits by the assignees against debtors of the bankrupt by virtue of any provision of the bankrupt law.

ASSUMPSIT by assignees to recover money alleged to have been paid by the bankrupts to the defendants by way of preference. A plea in abatement set up that the writ did not show jurisdiction in this court, and that in point of fact there was none, because the proceedings in bankruptcy were pending in the district court of Rhode Island.

C. T. Russell & H. W. Suter, for the defendants. The first and second sections of the bankrupt act confer jurisdiction of actions between the assignee and persons claiming an adverse interest upon the circuit and district courts of that district only in which the proceedings are pending: *In re Richardson*, 2 N. B. R. 74. The writ does not allege that the proceedings are pending here, and as the district courts have only the special jurisdiction conferred by the statute, all necessary averments must be made on the face of the record, or the action will be abated or dismissed.

E. P. Brown, for the plaintiffs. It is highly important that the district and circuit courts should take jurisdiction in such cases as this, in order to preserve uniformity in the construction of the act. The language of the statute is broad enough to cover this case.

LOWELL, J. I must assume the fact that the plaintiffs were appointed assignees in Rhode Island, because if it were otherwise they should have taken issue on the plea; but that there may be no miscarriage, they may do so within one week, if the plea should be adjudged valid. The cases cited by the defendants, and one other carefully considered case by Dillon, J. (*Markson v. Heaney*, 3 Chicago Legal News, 153), decide that the circuit and district courts of districts other than that in which the proceedings in any

Shearman & al. v. Bingham & al.

bankruptcy are pending, have no jurisdiction in equity to carry out the provisions of the bankrupt law in aid of these proceedings. The decision of Mr. Justice Story in *Ex parte Martin*, 5 Law Rep. 158, in which this auxiliary jurisdiction was affirmed, does not appear to have been cited in the discussion of either of these cases. That eminent jurist exhibits with great force the convenience which will be promoted by the exercise of such a power, and concludes that section six of the act of 1841 is broad enough to confer it. The clauses on which he relies as conferring a general jurisdiction are those which open and close the grant of power, viz.: "The district court in every district shall have jurisdiction in all matters and proceedings in bankruptcy arising under this act" . . . "and to all matters and things done and to be done under and in virtue of the bankruptcy until the final distribution and settlement of the estate of the bankrupt and the close of the proceedings in bankruptcy," he holds that the intermediate grant of power in particular cases is affirmative only and not restrictive. The learned judge does not refer to section eight, which gives the circuit court for the district where the decree of bankruptcy is passed concurrent jurisdiction with the district of all suits at law and in equity by and against the assignee. He confesses to great doubt as to the true construction of the act, but on the whole upholds it. Judge Prentiss afterwards followed the decision in *Ex parte Martin*, relying wholly upon it as authority for his action, though it is evident that he had his own doubts upon the question: *Moore v. Jones*, 23 Vt., 739, 746.

Ex parte Martin having been decided upon a different statute, and one which, though it is hardly to be distinguished from that of 1867 upon this point, does yet differ from it in some particulars, does not bind my judgment absolutely, and I shall therefore consider the case anew. And I must say that it seems to me that sections one and two of the act of 1867 grant jurisdiction only to the circuit and district courts of the district in which the petition in bankruptcy is filed.

Authority is undoubtedly given as under the former law, to hear and adjudicate upon all matters and proceedings in bankruptcy; but if this gives jurisdiction to all federal courts of suits by and against assignees, without reference to the *venue* of the bankruptcy,

it is very difficult to see why the district courts have not jurisdiction of all bankruptcies without reference to the residence or place of business of the bankrupt. The qualification immediately added after the grant to hear and adjudicate, viz.: "according to the provisions of this act," refers us to section eleven, by which we find that the proceedings must be where the debtor resides or carries on his business; and so, when we look to section two, we find the supervisory power of the circuit court is only over cases and questions "within and for the district where the proceedings in bankruptcy shall be pending." And the concurrent jurisdiction of such suits as the present, "in the same district," evidently means the district in which the proceedings are pending. This is so understood by Judge Dillon in the case above cited, and I see no other reasonable construction of the words. The corresponding section (eight) of the law of 1841, is so, as we have seen, and I have never heard a doubt expressed of the correctness of this interpretation.

It may not be amiss to repeat that section six of the act of 1841 differs a little from section one of that of 1867 in this: the earlier law gives jurisdiction to the several district courts of all matters and proceedings in bankruptcy, arising under the act or under any other that may afterwards be passed—a very comprehensive form of expression. The present law says they shall have jurisdiction in all matters and proceedings in bankruptcy, and they are hereby authorized to hear and adjudicate upon the same, according to the provisions of this act. Then, as we read on through the section, we find the marshalling of assets and many other proceedings specially mentioned, but all with reference to a bankruptcy supposed to be pending before that court. Mr. Justice Story, as we have seen, considered similar provisions in the law of 1841 as cumulative only; but it seems to me much more logical to construe the first section throughout as giving the most ample powers to the district courts to conduct and settle the proceedings in bankruptcy; but that it does not relate to suits at law or in equity between the assignee and third persons, which are regulated by section two.

It was the practice under the former acts to call upon the court by summary petition to dispose of all these rights; but the better

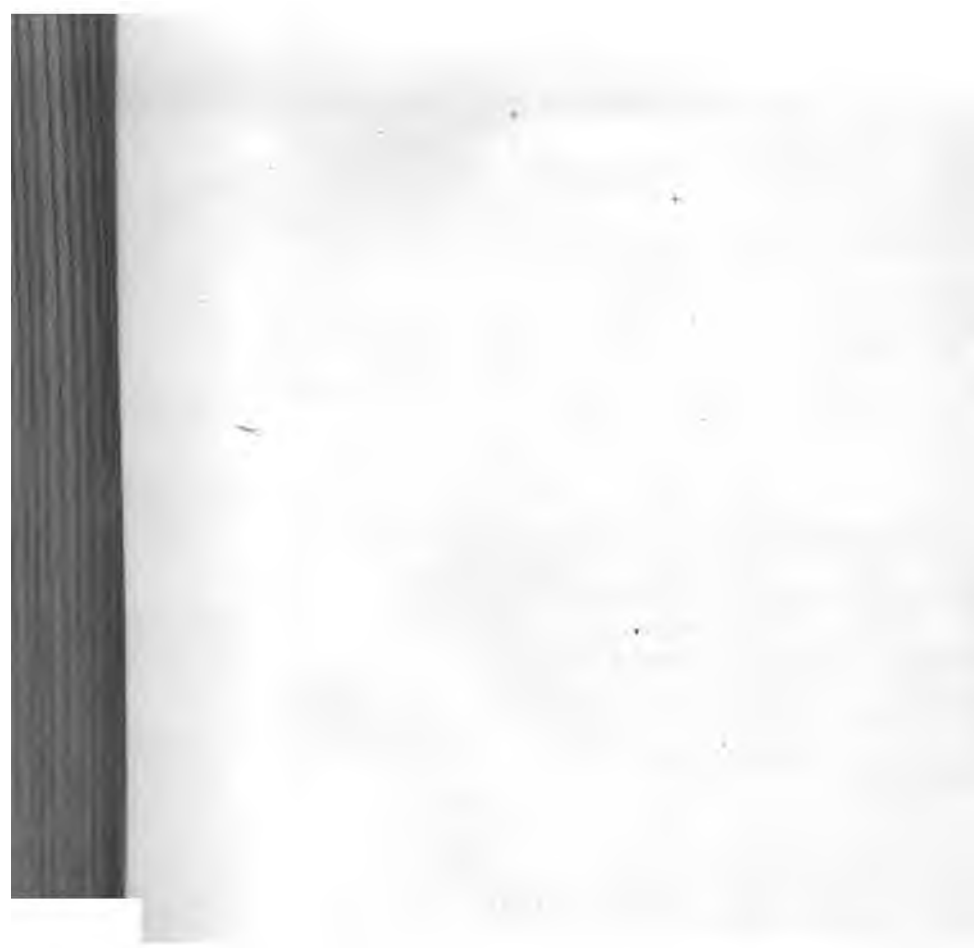
Shearman & al. v. Bingham & al.

opinion is, that under the act of 1867 the assignee must bring his action at law or in equity, as the nature of the case may require; and I understand the supreme court, at this term, to have recognized this as the true practice. If so, it is because such actions depend on section two, and not on the summary processes mentioned and implied in section one. Now, we have already seen, section two confines the jurisdiction of suits to the courts of the same district where the bankruptcy is pending. Upon the whole, therefore, I am of opinion that the true meaning of the law is that I have jurisdiction of such actions as this only when the bankruptcy is here. And I find in the decisions under this law, authorities which may properly be considered as balancing that of *Ex parte Martin*, and leaving me free to follow my own judgment. I should be glad to have the point taken to the circuit court for review. I may properly say that I should not regret to have my decision overruled, because I can see that there may, in the long run, be much convenience in bringing these cases in the federal courts, or in having the right to bring them there. Still I cannot admit that there is likely to be a failure of justice without it, because the State courts must deal with all titles depending upon bankruptcy precisely as the courts of the United States do, and must look to the supreme court at Washington as the ultimate arbiter of all doubtful points arising under the law. In point of fact, the larger part of such suits arising in Massachusetts are now brought in the State courts, unless I am misinformed, and it is probable that the practice will continue unless the supreme court should deny the jurisdiction of the State courts, because the forms and modes of proceeding are more familiar to the bar, and the courts are nearer at hand. If this court should absorb the whole of this jurisdiction, it is not certain that a trial could always be had in every case at the first term, as is now entirely feasible if the parties desire it. Another suggestion I will make for what it may be worth. It is possible that in a case such as this appears to have been in its origin — that is, where partners who live in different districts become bankrupt, proceedings could so far be taken in each district as to give both courts jurisdiction. I do not know that this experiment has ever been tried, and I give no opinion on the point.

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The plea must be adjudged good, and the suit will be dismissed, without costs, for want of jurisdiction, unless the plaintiff amend by taking issue on the plea within ten days. They can take exceptions to my ruling within the same time, if so advised.

Plea sustained.



A P P E N D I X.

RULES AND ORDERS FOR THE DISTRICT OF MASSACHUSETTS: IN BANKRUPTCY.

1.

WHEN a debtor petitioning in bankruptcy wishes to be discharged from his liabilities as member of a copartnership, the firm not being in bankruptcy, as well as from his separate debts, Form No. 1, prescribed in the general orders of the supreme court, shall be altered by setting forth in the petition the names and residences of the other partners, and the schedules shall show clearly the different classes of debts.

2.

Before a debtor makes application to the court to order that the fees and costs in his case shall not exceed the sum required to be deposited, he shall give the clerk, the marshal, and the register to whom the case has been, or is to be, referred, at least five days' notice, in writing, of his intention to make such application; such application shall be in writing and sworn or affirmed to by the debtor, and he shall be present when said application is presented to the judge, and may be examined on his oath or affirmation in respect to his means and his ability to pay the fees and costs prescribed by said act.

3.

The order of notice upon the bankrupt's petition for discharge shall be published in two newspapers once a week for three weeks, unless otherwise ordered by the court.

4.

For cause shown in any case, leave may be granted to any creditor to examine the bankrupt before the appointment of the assignee.

Rules and Orders for the District of Massachusetts : In Bankruptcy.

After the assignee is appointed, any creditor who may obtain an order for the examination of the bankrupt shall notify the assignee thereof, and the assignee shall attend the examination and take care that it is as thorough and complete as may be necessary. The assignee and any creditor may carry on such examination as fully and effectually as the creditor at whose petition it is obtained, subject to all proper regulations concerning the costs and expenses thereof, and to such other regulations as to the time and manner of the examination, as the register may find convenient. No second order for the examination of a bankrupt will be granted as of course, but an order therefor may be refused, or so restricted and modified in the matter of inquiry, or otherwise, as the justice of any case may require. Nor will any order for examination be granted as of course unless applied for within five months after adjudication of bankruptcy; and in those cases in which the bankrupt has a right to ask for his discharge before the expiration of five months, the order for examination shall be applied for before the return day upon the bankrupt's application for discharge. Upon good cause shown for the delay, the order may be issued after these periods.

5.

No order to show cause shall be issued on any petition for a bankrupt's discharge until the second and third meetings of the creditors of said bankrupt shall have been ordered; and the return day of any such order shall be at least two days after the time appointed for the third meeting.

6.

Whereas it appears that petitions for adjudications of bankruptcy are sometimes filed by or against supposed bankrupts with no intention on the part of the petitioner to proceed with the cause at once, and whereas delay in such cases may work great injustice and inconvenience to persons dealing with such supposed bankrupts in ignorance of such petitions, and to creditors and others, it is ordered,—

That all bankrupts petitioning for the benefit of the act shall prosecute the proceedings with due diligence, and if any such petitioner shall fail to procure an adjudication and warrant, and to give the warrant to the marshal for service within twenty-one days from the day of filing his petition, the petition may be dismissed on motion, unless there be good cause for the delay, or unless some one or more of his creditors shall undertake to carry on the proceedings.

Rules and Orders for the District of Massachusetts: In Bankruptcy.

And if any creditor petitioning for proceedings against a supposed bankrupt shall, unless for good cause, fail to apply for an order of notice to the debtor within five days after filing his petition, it may be dismissed, unless some other creditor shall have undertaken to prosecute the petition.

7.

At or before the time that the bankrupt takes the oath prescribed by section twenty-nine of the statute, it shall be the duty of the register to require him to answer on oath whether he has ever before been discharged from his debts under the provisions of the act; and return is to be made to the court of the answer of the bankrupt in the premises.

8.

In all cases of involuntary bankruptcy in which the bankrupt is absent or cannot be found, it shall be the duty of the petitioning creditor to furnish to the marshal on oath, within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of said bankrupt, according to the best information of said petitioning creditor. If the debtor is found and served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, and in default of such application shall furnish such schedule as aforesaid.

9.

Every assignee shall, immediately upon receiving an assignment of an estate in bankruptcy, send or deliver the same to the clerk, who shall give to the assignee an attested copy thereof, unless the original shall be needed for record in some registry of deeds, in which case the copy shall be retained by the clerk until the assignee returns the original, which it shall be his duty to do as soon as possible.

10.

Objections to the approval of any assignee who shall be duly elected must be made in writing, specifying fully the reasons of objection, and be filed with the register at the meeting at which the election is had, if then known to the person objecting; and the register shall proceed at once, or as soon thereafter as may be practicable and consistent with a due hearing,

Rules and Orders for the District of Massachusetts : In Bankruptcy.

to take all evidence that may be offered pertinent to such objections, and whether for or against the appointment, and shall report the same to the court. Further evidence or argument will not be heard by the court unless in special cases and for satisfactory reasons.

11.

The following national banks are designated as depositaries in bankruptcy, under rule twenty-eight of the general orders promulgated by the supreme court, viz. : —

For deposits by the clerk, The Revere National Bank of Boston.

For deposits by registers and assignees, —

District 1. The National Bank of Commerce of New Bedford.

2. The Neponset National Bank of Canton.

3. The Globe National Bank of Boston.

4. The Union National Bank of Boston.

5. Salem National Bank, Salem.

6. The National Pemberton Bank of Lawrence.

7. The Old Lowell National Bank.

8. The Mechanics' National Bank, Worcester.

9. The First National Bank of Amherst.

10. The Pittsfield National Bank.

12.

It is ordered, that at each general meeting of creditors of bankrupts after the first, and at each adjournment thereof, it shall be the duty of the assignee or assignees in each case to exhibit and deliver to the register all proofs of debts received by them from any register, other than the one holding such meetings, unless he shall have already done so. And at each meeting the register shall exhibit to the creditors present a list of all debts proved since the last preceding meeting; and any person interested may at any such meeting move to expunge the proof of any debt so exhibited, subject always to such terms and conditions concerning notice to the proving creditor as may fully secure his right to be heard therein.

13.

Unless otherwise ordered by the court, cases will be referred to the register in whose district the bankrupt, or, if copartners, the major part of them, resides.

Rules and Orders for the District of Massachusetts: In Bankruptcy.

Cases of partners whose residences are equally divided between different districts will be regulated by reference in rotation to the several registers, so as to secure equality in the number of references as nearly as may be. To effect this purpose within the city of Boston, the ward of the city in which each bankrupt resides shall be stated in the petition, or in an affidavit to be filed before the cause is referred.

This order is directory to the clerk, but is not to affect the jurisdiction of any register in any cause or under any circumstances.

14.

It shall be the duty of the registers to bring to the notice of each assignee, immediately on his appointment, the several rules and orders of the supreme court and of this court which concern the duties of assignees.

15.

The registers may authorize assignees to make sales of assets not being lands or other real estate, and of which the value is found to be less than \$800, at private sale, upon good cause shown, and when there is no opposition. To be binding as between the assignee and the creditors, such sales should be made after notice to them.

16.

Whenever an order for a meeting of creditors is issued by a register, he shall forthwith send in a notice thereof to the clerk of the court for his information and that of the court in the premises.

17.

Whenever, at any meeting of the creditors of a bankrupt, the allowance of any debt or claim offered for proof shall be objected to, in whole or in part, the register may, if he deem it expedient, require the objections to be fully stated, and the evidence on both sides to be forthwith produced before him, and shall report the evidence and his views of the case to the court as soon as may be.

And whenever it shall appear that frivolous objections are made to the proof of debts, the court will make such order concerning costs as may be just and expedient.

Rules and Orders for the District of Massachusetts : In Bankruptcy.

18.

It shall be the duty of the register to see that the cash expenses in each case, which, by section twenty-eight of the statute, are a first charge upon the assets, are paid by the assignee before his accounts are allowed.

19.

When an assignee or creditor desires to examine the wife of a bankrupt, or any person other than the bankrupt himself, under the provisions of section twenty-six of the bankrupt act, he shall apply to the court in writing, and state the name and residence of the person proposed to be examined, the subject or subjects upon which he is believed to be able to give material evidence, and the grounds of that belief, which application shall be supported by the oath of the applicant, or of some person having knowledge or information upon the subject-matter of the application. Thereupon a subpoena may be issued if there appears to be good cause therefor, referring to the application and setting forth the subjects of examination, and duly returnable before the register having jurisdiction of the cause.

20.

Contested motions and hearings in bankruptcy of which the party desiring to be heard shall have given four days' written notice to the adverse party, will be taken up on Saturday morning at ten o'clock.

The clerk shall keep a list of such hearings for each Saturday in the order in which he shall have been notified thereof, by either party, and the cases will be called by the court in that order.

21.

Every bankrupt shall put into his schedule a statement of all sums paid to counsel, whether as a retainer or otherwise, in anticipation of bankruptcy, or for services rendered or to be rendered in connection therewith, and if the amount thereof exceeds one hundred dollars, it shall be the duty of the assignee to bring the fact to the notice of the court.

22.

The registers shall in each case file in court a full and particular account of all charges made by them against the assets, or paid them by the assignee, and the same shall be passed upon before the allowance of the assignee's account.

INDEX TO RULES IN BANKRUPTCY.

1. Petition by bankrupt who wishes discharge from partnership debts.
2. Costs when bankrupt is poor.
3. Publication of notices for discharge.
4. Examination of bankrupts.
5. Meetings to be held before discharge.
6. Rule to speed proceedings and authorize dismissal of petitions if not prosecuted.
7. Oath whether bankrupt has been discharged before.
8. Schedules to be filed by petitioning creditor, when.
9. Assignments to be filed with the clerk.
10. Objections to appointment of assignee.
11. Banks in which money may be deposited by clerk and assignees.
12. Debts proved not at meetings to be called over at meetings.
13. To what registers cases to be referred.
14. Registers to notify assignees of their duties.
15. Sales of property by assignees.
16. Registers to notify clerk of orders for meetings.
17. Objections to debt offered for proof.
18. Costs to be paid before accounts passed.
19. Examination of wife and other third persons.
20. Motions in bankruptcy.
21. Counsel fees to be returned in schedules.
22. Registers' costs.

I N D E X.

AFFREIGHTMENT.

1. If, by the terms of a charter-party the whole freight is payable on the return to the home port, the master has a lien for the whole freight on goods shipped at the foreign port by order of the charterer to be delivered to the assignee of the charter. *The Eliza's Cargo*, 83.
2. *It seems*, that the consignee of goods under a bill of lading of the whole cargo, or all the consignees, if unanimous, may direct the master, in the absence of express contract, to haul to any suitable and convenient wharf within the limits of the port of discharge. *The E. H. Fittler*, 114; *The Boston*, 464.
3. The master of a general ship, having the goods of several shippers may go to any suitable wharf without consulting the consignees. *Ib.*
4. If a majority of the shippers can designate the wharf, as it seems they may by the usage of certain trades, their decision must be notified to the master before he has engaged his wharf and hauled in and discharged the tug. *Ib.*
5. A printed clause in the bill of lading, "ship not responsible for rust, leakage, or shrinkage," considered. *The Invincible*, 225.
6. Proof of greater than *average* leakage is not sufficient to prove negligence on the part of the ship. *Ib.*
7. Nor that oil was placed in a part of the ship where it was more subject to waste than in other parts, if this manner of loading was customary. *Ib.*
8. Where the consignee had indorsed the bill of lading back to the original shipper with the master's knowledge, the master was bound to take the vessel to the wharf directed by the shipper. *The Boston*, 464.
9. Where a master failed to deliver a cargo according to his contract, and the vessel was libelled for damages, and after the libel was brought the shipper replevied the cargo, the assessment of damages was postponed. *Ib.*
10. A bill of lading undertook to deliver at a certain port, and recited that the vessel was bound to a certain wharf. *Held*, that the contract was to deliver at that wharf. *Cain v. Garfield*, 483.
11. The vessel had not arrived, for the purpose of computing lay-days, until she reached that wharf. *Ib.*

ADMIRALTY.

See JURISDICTION, 1, 3, 4, 5, 6, 11, 12.

ALIEN.

An alien resident in the United States is subject to the bankrupt law. *Re Goodfellow*, 510.

APPLICATION OF PAYMENTS.

In the absence of appropriation by the parties at the time of payment of money, it will usually be applied by law to the items of an open account in the order of their dates. *The A. R. Dunlap*, 350.

ARBITRATION.

1. A submission to three referees does not authorize an award by two only. *The Nineveh*, 400.
2. An award in a collision cause which decides the liability but not the damages is not final. *Ib.*

ARMY.

1. Whether the oath of a recruit is conclusive of his age excepting in protection of the mustering officer, *quære*. *In re McDonald*, 100.
2. A statement of age not sworn to is not an oath of enlistment. *Ib.*
3. The courts can inquire, on *habeas corpus*, into the validity of enlistments. *Ib.*
4. Whether a boy under sixteen years old can be lawfully enlisted in any case, and one under eighteen without consent of his father, *quære*. *Ib.*
5. In discharging a minor, on his father's petition, the court should order a return of the advance pay. *Ib.*

ARREST.

1. Arrest of a supposed criminal in one district for trial in another. *Re Alexander*, 530.
2. Arrest of a bankrupt in civil action pending the proceedings. *Re Walker*, 222; *Re Devoe*, 251; *Hazelton v. Valentine*, 270; *Re Whitehouse*, 429; *Minon v. Van Nostrand*, 458.

ASSUMPSIT.

This action will lie without privity of contract. *The Eureka Manuf'g Co.*, 500.

AWARD.

See *The Nineveh*, 400.

BANKRUPT LAW.

ACTS OF BANKRUPTCY.

1. A debtor over whom the court has jurisdiction commits an act of bankruptcy when he files his petition, and a single creditor cannot resist the adjudication by plea and proof that the debtor is able to pay all his debts. *Re Fowler*, 161.
2. If the debtor have property concealed, that would be a reason for adjudging him a bankrupt, but is none for refusing an adjudication. *Ib.*
3. Difference between the petition of one partner to have the firm adjudged bankrupt, and the petition of a sole trader in this respect. *Ib.*
4. The dissolution of a partnership may be an act of bankruptcy if done with intent to convert joint into separate assets for the purpose of preferring a separate creditor. *Re Waite*, 207.
5. Where partners in trade dissolved their firm and one partner took all the assets and agreed to pay all the debts, and on the same day, and as part of the same transaction conveyed all the effects by way of mortgage, to secure a pre-existing debt for which both partners had been severally liable, and the partners were insolvent at the time, and neither had any separate estate: *Held*, an act of bankruptcy by both. *Ib.*
6. *It seems*, that under the bankrupt act a debtor may give a preference though he does not contemplate bankruptcy. The question is of intent to give one creditor an advantage over the others. *Re Locke*, 293.
7. This is a question of fact which is not conclusively decided by showing a known insolvency, though it may be inferred from such insolvency in the absence of controlling evidence. *Ib.*
8. A fraudulent preference which will prevent a discharge of the bankrupt, under § 29 is defined in that section and in § 35, without reference to § 39. *Ib.*
9. Payment of rent and some other necessary expenses without intending to become bankrupt, held not to be fraudulent preferences within § 29, though the debtor knew he was insolvent. *Ib.*
10. The assignee in bankruptcy of one partner cannot set aside a conveyance made by both partners with intent to prefer a joint creditor, the other partner not being bankrupt. *Forsaith v. Merritt*, 336.
11. The payment of a joint debt does not become a voidable preference unless the debtors both become bankrupt within the time limited by the statute. *Ib.*
12. The assignee of one partner becomes a tenant in common with the other partner, and his equities depend on the title of his assignor. *Ib.*
13. One partner may petition to have the firm adjudged bankrupt though the firm has been dissolved, and he has undertaken to pay all the joint debts. *Re Stowers*, 528.
14. So long as partnership debts remain due and outstanding a joint petition may be brought by or against the partners, and this notwithstanding a dissolution. *Re Williams*, 406.

15. If the debtor is clearly insolvent the petition is not defeated by tendering the petitioning creditor the amount of his debt. *Ib.*
16. When a conveyance with intent to delay one creditor is an act of bankruptcy. *Ib.*
17. One who prepares for market and sells lumber, the growth of his own land, is a manufacturer within the meaning of the bankrupt act as amended by the act of July 14, 1870. *Re Chandler*, 478.
18. The commercial paper mentioned in § 39 of the bankrupt act includes not only the notes, bills, &c., given by a merchant or other person mentioned in the section in the ordinary course of his business, but all negotiable paper. The terms are descriptive of the kind of paper, and not of the mode in which it was in fact issued or used in the given case. *Ib.*
19. The failure of an accommodation indorser to pay the note for fourteen days after his liability has been duly fixed, is an act of bankruptcy, if there is no defence to the note in the hands of its holder, and the indorser is a manufacturer. *Ib.*
20. One who lends money to a retail trader within four months of his bankruptcy, and when he was actually insolvent, on a mortgage of his stock in trade, is bound to make some inquiry into his object in raising the money. *Ex parte Mendell*, 506.
21. Clauses one and two of the thirty-fifth section of the bankrupt act considered. *Ib.*
22. A mortgagee who makes inquiry of the trader and is informed that the money is wanted in his business will not lose his security, if there be no evidence that there was a fraud intended, though the trader proved to be insolvent, and the conveyance was out of the usual course of his business. *Ex parte Packard*, 523; *Ex parte Ames*, 561.

RIGHTS, DUTIES, &C., OF THE BANKRUPT.

1. A bankrupt under examination by his creditors has no right to answer by his attorney nor to consult with him, unless the examining magistrate shall expressly grant that privilege. *Re Tanner*, 215.
2. The bankrupt act does not relieve from arrest one who is in custody, when the petition in bankruptcy is filed, though for a debt provable and dischargeable under the act. *Re W. A. Walker*, 222; *Re Devoe*, 251; *Hazelton v. Valentine*, 270; *Minon v. Van Nostrand*, 458.
3. Where a bankrupt born in Boston, became domiciled in California, but left that State with no intention of returning, and after staying without the limits of the United States several months, returned to Boston, and in less than two months thereafter filed his petition in bankruptcy, *held*, that the act of leaving California with no intention of returning, at once revived the domicile of origin, and his petition to be adjudged bankrupt was rightly filed in Massachusetts. *Re W. S. Walker*, 237.
4. Where a debtor, a citizen of Massachusetts, was arrested in New Brunswick on *mesne process*, and gave bail, and after judgment had been entered up against him, surrendered in exoneration of his bail and was imprisoned, and afterwards filed his petition in bankruptcy in Massachusetts, and still

later was charged in execution in accordance with the laws of New Brunswick, which require that a debtor so surrendering shall be charged within three months thereafter; *Held*, that such charging in execution was not an arrest during the pendency of the proceedings in bankruptcy, but related back to the surrender. *Hazellon v. Valentine*, 270.

5. *It seems*, that where an arrest is made out of the jurisdiction of this court, both debtor and creditor being citizens of Massachusetts, and the debtor being in bankruptcy here, the circuit or district court might, in a proper case, enjoin the creditor from proceeding with his arrest. *Ib.*
6. A voluntary bankrupt is entrusted with the care of his estate before an assignee is chosen, as a sort of trustee. He has no right to buy of the marshal the stock of goods which the court has ordered to be sold as likely to deteriorate. *March v. Heaton*, 278.
7. Such a sale will be set aside on complaint by the assignee without proof that the price was inadequate, or that there was any fraud in fact intended. *Ib.*
8. The omission from the bankrupt's schedule of the names of certain creditors with their consent, and without fraud or injury to the rights of other creditors, will not bar the bankrupt's discharge. *Re Needham*, 309.
9. Such an omission was wilful in a strict sense; but the oath to the schedule was not wilful false swearing under § 29, because the bankrupt believed that these persons waived their rights for the benefit of the estate, as they had a right to do. *Ib.*
10. It is the intent of section 26 of the bankrupt act, that the bankrupt should be fully examined as to all his dealings, &c., but not that he should be examined by each creditor separately. It is therefore the practice to require the assignee to see to it that the first examination is thorough and complete, and it is not the practice to grant a second order for examination except for cause. *Re Gilbert*, 340.
11. And for like reason the order is not passed before the appointment of the assignee without special cause. *Ib.*
12. The bankrupt's wife may be required to testify to all facts and transactions to which she was either a party or a witness, but not to mere confessions or admissions of her husband concerning his dealings with third persons. *Ib.*
13. Charges of fraud filed against a defendant who is seeking the benefit of the poor debtor law of Massachusetts, though filed after the bankruptcy of the debtor, do not make a new suit or proceeding so as to enable this court to interfere and discharge the debtor. *Ib.*; *Minon v. Van Nostrand et al.*, 458.
14. Creditors can resist an adjudication on the voluntary petition of the alleged bankrupt only on proof that the court is without jurisdiction. *Re Fowler*, 161; *Re Goodfellow*, 510.
15. If the action in which a bankrupt is arrested on *mesne process*, or on execution, appears by the record thereof to be founded on a fraud of the bankrupt, he is not to be relieved from the arrest. *Re Devoe*, 251; *Re Whitehouse*, 429.

RIGHTS, DUTIES, &C., OF ASSIGNEES.

1. The court will not confirm an assignee chosen by the creditors if he is disqualified by character or otherwise, from acting with fairness. *Re Clairmont*, 230.
2. A person residing out of the district, or having a direct interest adverse to that of the creditors generally, or who is the attorney of such a person, or of the bankrupt, is disqualified. *Ib.*
3. But a general creditor, or the attorney of one, or a person who has been an attorney of the bankrupt in other matters is not necessarily ineligible. Mere bias or prejudice arising from information concerning the conduct and dealings of the bankrupt will not usually disqualify. *Ib.*
4. Where creditors attached the goods of a trader for the purpose of preventing waste, and the attachments were afterwards dissolved by an assignment in bankruptcy, the necessary and proper charges for the custody of the property incurred by the attaching officer after the petition in bankruptcy is filed, are incurred for the assignee and must be paid by him out of the assets. *Ex parte Fortune*, 306.
5. In such case the officer has no lien upon the goods for his costs, but the bankrupt court may authorize the assignee to pay such part of them as may have benefited the estate. *Ib.*
6. Assignees in bankruptcy stand no better than the bankrupts in respect to the assets, excepting in cases of fraud or of attachments of less than four months' standing. *Re McKay*, 345; *Re Griffiths*, 431; *Ex parte Ames*, 561.
7. Where the manufacturers obtained their pay for an engine on the false representation that it had been finished and delivered to a carrier to be delivered to the customer, and they afterwards built such an engine as had been ordered, and marked it with the customer's name, but had not sent it from the shop at the time of their bankruptcy; *Held*, that the customer had acquired a title to the engine by estoppel, which he might enforce against the assignee in bankruptcy. *Re McKay*, 345.
8. A stipulation in a lease that fixtures might be removed at the end of the term if all the covenants were kept, and should not be removed during the term without the consent of the lessor, does not give the lessor a lien on furniture not affixed to the freehold. *Ex parte Morrow*, 386.
9. *It seems*, that if such a stipulation did include mere furniture, it would not be valid against an assignee in bankruptcy before entry and possession taken by the lessor. *Ib.*
10. Such a stipulation does create a valid lien on trade fixtures annexed to the freehold, and the assignee can take them only on payment of the arrears of rent. *Ib.*
11. If the assignee of a bankrupt elects to take a term belonging to the bankrupt under a lease, he must take with the burden of the accruing rent, and not merely with the obligation to pay from the time he begins to occupy. *Re Laurie, Blood, & Hammond*, 404.
12. Where a petition *in invitum* was filed by the creditors of a firm January 8,

1869, and they were adjudged bankrupts March 26, 1869, and the assignees occupied their store and paid rent therefor, for two or three months from that date, without any express stipulation concerning the quarter's rent which came due April 1, 1869; *held*, the assignees were bound to pay that quarter's rent in full. *Ib.*

13. The lessor of a shop took a mortgage on the fixtures as security for the rent and the performance of the covenants of the lease. The lessee was to pay a certain rent monthly, and the taxes. The lease provided that it should terminate if the lessee should be declared bankrupt, or any assignment of his property should be made for the benefit of creditors, unless within ten days from the date of the petition or assignment some sufficient person should become surety for the rent. The lessee became bankrupt November 1, 1869, an assignee was chosen November 23, and the keys were returned to the lessor January 1, 1870. *Held*, the mortgage was a valid security for the rent up to January 1. *Re Yeaton*, 420.
14. *It seems*, that an assignee in bankruptcy will not become responsible for rent of a store merely by leaving some goods there mingled with other goods which were mortgaged to the lessor. *Ib.*
15. In the absence of actual fraud, a mortgage of chattels made in Massachusetts holds good against the assignee in bankruptcy, though it had not been duly recorded at the date of the bankruptcy. *Re Griffiths*, 431.
16. If a mortgage on the bankrupt's property is held as security for several notes and indorsements given by the mortgagee for the accommodation of the bankrupt, and the security is insufficient, the several holders of the paper are to have a *pro rata* share of the proceeds of the mortgaged property; and may prove against the estate for the balance of their respective debts after crediting their shares of the security. *Ib.*
17. The assignee may, in some cases, be empowered by express order of the court to expend money in finishing goods which he finds among the assets in an unmarketable condition. *Foster v. Ames*, 313.
18. The court will not remove an assignee though a majority in number and value of the creditors wish it, if the motives of the majority are open to suspicion, and the removal is likely to prejudice the minority. *Re Dewey*, 493.
19. The district court will not restrain an action against an attaching officer by a person whose title accrued before the bankruptcy, though the title is held in fraud of the assignee. *Re Evans*, 525.

PROOF OF DEBTS.

1. A judgment debt when offered for proof in bankruptcy may be impeached for fraud or irregularity, including fraudulent preference; but the consideration of a judgment cannot be collaterally inquired into. *Ex parte O'Neil*, 163.
2. A creditor who has proved his debt, may withdraw it, if no intervening rights will be interfered with, as if an attachment has been waived by the proof and the garnishee has paid over in good faith. *Re Hubbard*, 190.
3. A debt barred by the statute of limitations of the State where the bankrupt

- resides, and in which his petition is filed, cannot be proved in bankruptcy. *Re Kingsley*, 216.
4. An entry of the debt on the bankrupt's schedule is not an acknowledgment or new promise to revive a stale debt. *Ib.*
 5. *It seems*, that one who has in good faith bought a debt against the bankrupt after the commencement of the proceedings may prove it in the bankruptcy, the form of oath being varied to conform to the fact. *Re Murdock*, 362.
 6. The assignee of a *chose in action* not negotiable, may prove it against the estate of the debtor in bankruptcy upon his own deposition without adding the deposition of his assignor. *Re Fortune*, 384.
 7. The deposition should show the name of the original creditor, in order to enable the assignee in bankruptcy to compare the debt with the books and accounts of the bankrupt. *Ib.*
 8. If, as matter of form, the proof should stand in the name of the assignor, the assignee has all the rights of a creditor in the bankruptcy, including the right to take any action in the name of his assignor, but at his own expense, that may be necessary. *Ib.*
 9. A pledgee in good faith and for value of promissory notes transferred to him before maturity can prove them for their full amount against the assets in bankruptcy of the promisors, whatever may have been the equities between the promisors and the pledgor. *Re Storms*, 394.
 10. But if there are such equities which would prevent the pledgor from proving, then the pledgee can receive in dividends only the amount for which he holds the notes in pledge. *Ib.*
 11. Where such a pledgee, after the bankruptcy of the promisors, settled with the pledgor who was insolvent, and in the arrangement took the notes as payment for a certain sum, and the arrangement appeared to have been made in good faith, *held*, he might still prove for the face of the notes and receive dividends to the extent of the sum paid for them. *Ib.*
 12. One who holds the note of the bankrupt not yet due has a good petitioning creditor's debt. *Re Alexander*, 470.
 13. A creditor who holds security from the supposed bankrupt may petition for adjudication against him, if the security falls short of the debt by two hundred and fifty dollars or more. *Ib.*
 14. It is no defence to a petition *in invitum* that the petitioning creditor is the only creditor of the supposed bankrupt. *Ib.*
 15. A gift of all a debtor's property to his wife is an act of bankruptcy. *Ib.*
 16. If land stands in the name of the debtor and is conveyed by him for the apparent purpose of avoiding attachments, it is doubtful whether parol evidence ought to be received that the land was held only in trust. *Ib.*
 17. *It seems*, that a creditor of a bankrupt holding security on the property of a third person, may prove for his whole debt without renouncing such security. *Ib.*
 18. A bankrupt firm owed A. \$5897 for which he had their note, and as collateral security, the notes of third persons indorsed by the bankrupts for about \$7000. These persons had failed. *Held*, A. might surrender

the note of the bankrupts and prove on their indorsements of the collateral notes up to the amount of the debt of the bankrupts to him, and might prove for the full amount against the promisors on the collateral notes receiving in dividends not more than the whole debt due him from the bankrupts. *Re Whitney et al.*, 497.

19. Where A. had fraudulently overdrawn his bank account by collusion with the cashier, and had given the checks to an incorporated manufacturing company of which he was the principal shareholder, and A. was always largely in advance to the company, and both he and the company became bankrupt: *Held*, the bank could prove as a creditor directly against the company to the exclusion of the assignee of A. *Re The Eureka Manuf'g Co.*, 500.
20. The bankrupt's wife may prove for money lent him from her separate estate. *Re Blandin*, 543.
21. A loss of rent accruing after the bankruptcy of the tenant cannot be proved against his estate, unless there is some special provision in the lease which makes such a loss a debt between the parties. *Ex parte Houghton*, 554.
22. The landlord may prove for any damages whether liquidated or not, which he suffered by the tenant's breach of covenant before the bankruptcy. *Ib*
23. Proof of debt by attorney. *Re Barnes*, 560.

DISCHARGE.

1. Omitting property from schedules on the plea that it belonged to assignees under a former assignment in insolvency under a State law, *held* to be no answer to a charge of concealment. *Re Beal*, 323.
2. If a bankrupt has possession of joint estate and joint books of account, and wilfully fails to disclose them to his separate assignees, he is not entitled to his discharge. *Ib*.
3. It is not essential to the debtor's discharge, that the assignee should have given due notice of his appointment. *Re Littlefield*, 331.
4. Nor that the second and third general meetings of his creditors should be held at the expiration of three months and six months respectively, from the date of the adjudication. *Ib*.
5. It is for the creditor and not for the bankrupt to see to the appointment for his examination. It is for the bankrupt to be ready to attend on due notice. *Ib*.
6. Whether if a debtor attends and refuses to be examined, there is any remedy excepting by motion to commit, *quære*. *Ib*.
7. It is necessary to the discharge of a bankrupt trader, that he should have kept a cash-book subsequently to the passage of the bankrupt act. *Ib*.
8. A bankrupt had carried on a small trade for cash and had discontinued it, &c., *held*, that a failure to keep books would not prevent his discharge. *Re Keach*, 335.
9. The fact that there was nothing of interest to his bankruptcy creditors in the affairs of his old trade can be proved otherwise than by books. *Ib*.

10. A creditor whose debt is provable may oppose the discharge of a bankrupt, although it has not been proved. *Re Murdock*, 362.
11. Where a notorious conveyance of land was made to the wife ten years before the bankrupt law was passed, and not upon a secret trust; *held*, not to be fraudulent, and its omission from the schedule not to be a concealment. *Ib.*
12. Where it was doubtful whether the bankrupt had any interest in a promissory note held by a third person, and there was no evidence of concealment; *held*, that the bankrupt should be discharged although it was not on his schedule. *Ib.*
13. What preferences will avoid discharge. *Re Locke*, 293; *Re Batchelder*, 373; *Re Connor & Hart*, 532.
14. When the preferred creditor has restored the money or property and proved his debt the preference will not bar the debtor's discharge. *Re Connor & Hart*, 532.
15. A merchant who has failed to keep proper books of account is not entitled to a discharge in bankruptcy, although the fault is wholly with his book-keeper. *Re Hammond & Coolidge*, 381.
16. An omission to write up a merchant's books for a reasonable time while the books are wanted for use in court, the accounts being kept on slips of paper ready to be inserted in their proper places, is not a failure to keep the books. *Ib.*
17. Otherwise, of an omission without excuse, or for an unreasonable time, or a failure to procure new books if the old books are lost. Entries on separate loose slips of paper would not, as a permanent system, be keeping books. *Ib.*
18. A consignment of goods for sale is not a pledge or conveyance of them within § 29; but where there was a consignment to one out of the district, in contemplation of bankruptcy and with intent to keep the property from the assignee, *held*, to be a removal of goods within § 29. *Ib.*
19. If a bankrupt, having a knowledge of the existence of his books, and of their place of deposit, refuses to give them to his assignee, and denies their existence, this is a concealment of the books. *Ib.*
20. When objections are filed to the discharge of partners who are bankrupts, the trial may be joint, but the verdict and decree must be several. *Re George & Proctor*, 409.
21. A preference is committed when a trader, knowing that he must stop payment, gives one creditor an intended advantage over others. *Ib.*
22. The failure to keep proper books of account will prevent the discharge of both partners, though the fault may be wholly that of one of them. *Ib.*
23. Any of the acts which are made misdemeanors by § 44 of the bankrupt law may be set up and proved in opposition to the discharge of a bankrupt, though he has never been tried criminally for the misdemeanor. *Ib.*
24. The bankrupt act does not refuse to discharge a debtor merely because he has misused and wasted his estate. *Re Rogers*, 423.
25. Nor because he has made fraudulent purchases. *Ib.*

26. When a bankrupt is a tradesman within § 29, and bound to keep books of account. *Ib.*
27. Property acquired in gaming is assets, which, if the bankrupt spends in gaming, he loses his discharge. *Re Marshall*, 462.
28. *It seems*, that an alien debtor who, when residing abroad, has made conveyances which would be preferences under our bankrupt law, and then within six months comes to the United States and goes into bankruptcy, is not entitled to his discharge. *Re Goodfellow*, 510.
29. If such a debtor has made conveyances at his home, in New Brunswick, which are fraudulent at common law, and on a secret trust for himself, is not to have his discharge in bankruptcy. *Ib.*

RULES IN BANKRUPTCY.

See APPENDIX, 581.

BILL OF LADING.

See AFFREIGHTMENT; DEMURRAGE.

BOND.

Bond of master of American vessel for safe return of his crew construed. *United States v. Parsons*, 107.

See BOTTOMRY.

BOOKS OF ACCOUNT.

1. Who are to keep books and what books in order to obtain a discharge in bankruptcy. *Re Littlefield*, 331; *Re Keach*, 335; *Re Hammond & Coolidge*, 381; *Re George & Proctor*, 409.
2. Inspection of books by assessor of internal revenue. *Re Chadwick*, 439.

BOSTON.

Regulations of the harbor of, and how far binding on vessels. *Pierce v. Lang*, 65; *The Clover*, 342.

BOTTOMRY.

1. When a voyage is necessarily abandoned in a foreign port, after the vessel has been repaired there, the master has power to hypothecate the ship, for the purpose of getting her back to the owners. *The Robert M. Lane*, 388.
2. A bottomry bond is not vitiated by the stipulation that the cost of insurance shall be included in the sum to be paid by the ship in case of her safe arrival. *Ib.*
3. The master (since deceased) had written to his owners, and the letters were

not produced by either side, and were not within reach of the libellants: *Held*, that the master would be presumed to have made full and true communication to his owners. *Ib.*

CHOSE IN ACTION.

May be proved in bankruptcy by the holder thereof, though it be not negotiable, and though transferred after the petition. *Re Murdock*, 362; *Ex parte Davenport*, 384.

COLLECTORS.

. . See CUSTOMS, 1-5; INFORMER, 1-3.

COLLISION.

1. When one vessel drives upon or strikes another, which is at anchor in a proper position, the presumption is that the former is in fault. *The Lincoln*, 46; *Pierce v. Lang*, 65.
2. It cannot be affirmed, as matter of law, that a vessel, coming to anchor in a harbor, is only obliged to swing clear of other vessels already anchored there. She is bound, if possible, to take up such a position as is prudent and safe under all the circumstances. *Ib.*
3. Where a brig was brought to anchor in the daytime, when the wind was blowing heavily and seemed likely to increase, ten fathoms astern of one schooner, and twenty fathoms ahead of another, and had out, when so anchored, only half the scope of her chains, and, during the night, the schooner ahead fouled the brig, which dragged on the schooner astern: *Held*, the brig was responsible to the latter schooner, whether she was at all in fault for the first collision or not, because she was anchored too near the schooner astern. *Ib.*
4. *Semble*, she was too near the other schooner also. *Ib.*
5. The injured schooner should have had an anchor watch; but as the neglect to keep one did not contribute to the collision, she was decreed to recover her whole damage. *Ib.*
6. A steamer was warped out of a dock without notice to the wharfinger or to the shipkeeper of a vessel properly moored in the same dock, and injured such other vessel by striking against her; *Held*, the steamer was solely in fault, though the other vessel had her yards squared, and the collision would not have occurred if they had been braced up, no law or usage being shown requiring the yards to be braced up in such a case. *Pierce v. Lang*, 65.
7. An omission to carry the lights required by statute is a fault, like any other, which, if it caused or contributed to a collision, will render the delinquent vessel liable in damages, but will not necessarily prevent a recovery on her part if the other vessel was in the wrong. *The D. P.*, 124.
8. The owners of a dock are liable for damage suffered by a vessel lawfully using the dock, and caused by a defect in the bottom, known to the

owners of the dock, and not known to the master of the vessel. *Sawyer v. Oakman*, 134.

9. A schooner grounded in the entrance to a dock, and a brig that was ready for sea undertook to haul by her after her officers were warned that there was not room enough, and became jammed, and both vessels were injured; *Held*, the brig alone was in fault. *The Stromless*, 153.
10. A collision occurring in the daytime and good weather may possibly be an inevitable accident. *The Java*, 165.
11. There is a fog within the meaning of the statute requiring a horn to be sounded, whenever the weather is so thick that the horn will be heard farther than the signals will be seen. *The Monticello*, 184.
12. A vessel is anchored in a fair-way, within the meaning of the statute requiring a light to be shown by a vessel so anchored, if she is within the limits of a fair-way *de jure*, though she lies just inside of a boom which has been lawfully anchored there, and of which the public have had no notice. *The Willard Saulsbury*, 194.
13. A vessel so anchored in a harbor would be bound to show a light by the rules of the maritime law, without regard to the statute. *Ib.*
14. *It seems*, a court of admiralty in the United States has jurisdiction of a proceeding *in rem* in behalf of one who has suffered personal injuries by a collision. *Ib.*
15. A schooner with the wind aft was crossing the course of a schooner close-hauled on the port tack, and undertook to go astern of her; at the same time the close-hauled vessel came about, and a collision ensued. *Held*, that the close-hauled vessel was in fault for not keeping her course. *The Richard R. Higgins*, 290.
16. To relieve a vessel from fault in changing her course when the rule requires her to keep it, she must show clearly that it was done after a collision had become inevitable, or at least after a courageous and skilful navigator would have thought it so. *Ib.*
17. One vessel has no right, without necessity, to tack so near another vessel that the pilot of the latter cannot, in the exercise of ordinary skill, avoid her. *The Alice*, 299.
18. When a vessel is tacking, and is out of command, other vessels must avoid her. *Ib.*
19. A vessel sailing in a harbor in the daytime must have a lookout forward. *Ib.*
20. As a general rule a vessel going free should pass under the stern rather than across the bows of one close-hauled. *Ib.*
21. The statute of Massachusetts of 1847, ch. 234, § 2, requiring vessels in Boston harbor to rig in their jib-booms in certain cases, is valid, and binds all persons navigating that harbor. *The Clover*, 342.
22. A vessel whose jib-boom is standing contrary to the law must be held liable for a collision which happens in part or in whole by reason of the neglect. *Ib.*
23. Where a tug in such a case knowing the position of the first vessel collided with her, when by the exercise of ordinary skill and care she might have avoided her, the tug must bear one-half of the damage. *Ib.*

24. *Quære*, what is the true construction of Stat. 25 July, 1866, which requires ocean-going steamers and those carrying sail, to have one white light as prescribed by the act of 1864, and requires coasting steamers to carry two such lights, the fact being that many coasting steamers are ocean-going and carry sail? *The Glaucus*, 366.
25. If a sailing vessel and a steamer are crossing at an angle of forty-five degrees, and the pilot of the steamer sees both lights of the sailing vessel at any considerable distance, and the steamer is going twice as fast as the sailing vessel, and puts her helm so as to increase the distance between them, it is impossible that any act done on board the sailing vessel after both her lights were thus seen, should bring the vessels together, stem and stem. *Ib.*
26. The supervising inspectors of steamboats have power, by law, to make regulations not inconsistent with the general laws of navigation, for steamers passing each other. *The American Eagle*; *Forest City*, 425.
27. Rule 2 adopted by the inspectors, so far as it purports to authorize pilots to disregard the general law concerning vessels meeting end on, is void. *Ib.*
28. A pilot who disobeys the law and obeys the inspectors' rule, does so at his own risk. *Ib.*
29. If a vessel is sailing at night without lights she is *prima facie* in fault. *Ib.*
30. So if she has no lookout forward. *Ib.*
31. The owner of a yacht kept for his own use may recover, in a collision cause, as damages for the loss of her use while repairing, the price at which he could readily have let her for pleasure parties. *The Walter W. Pharo*, 437.
32. The question whether the speed of a steamer running in a fog was moderate, is one of sound judgment and not of nautical skill, and therefore not the subject for expert testimony. *The Blackstone*, 485.
33. A steamer not moderating her speed in a thick fog was held responsible for a collision with a sailing vessel, though the latter, for the purpose of reaching an anchorage, altered her course after the fog set in, and after she had seen the steamer. *Ib.*
34. A tug in towing a ship brought her against a wharf; *held*, that the tug was liable in damages, although the ship was rotten and unseaworthy, unless the condition of the vessel was the sole cause of the injury. *The Workman*, 504.
35. Where a steamer was navigating a narrow channel with six barges firmly lashed to each side of her, and a schooner was outsailing and passing her near one of the rearmost barges, and the steamer ported her helm to avoid a shoal, which brought the barge across the schooner's track, but the latter had time to avoid the barge, *held*, the schooner was in fault. *The Iris*, 520.
36. For questions of damages in collision, see *The Stromless*, 153; *The Monticello*, 184; *The Willard Saulsbury*, 194; *The Clover*, 342; *The Glaucus*, 366; *The Walter W. Pharo*, 437; *The Workman*, 504.

COMMERCIAL PAPER.

This term as used in the bankrupt act considered. *Re Chandler*, 478.

CONSPIRACY.

See *United States v. Boyden*, 266.

CONSTITUTIONAL LAW.

1. Whether congress could vest exclusive power in the secretary of war to discharge soldiers illegally enlisted, unless when the privilege of the writ of habeas corpus is duly suspended, *quære?* *In re McDonald*, 180.
2. Whether congress has power to punish a fraud committed by a debtor on his creditor within a State, unless the fraud is connected with bankruptcy or some other subject-matter within federal jurisdiction, *quære?* *United States v. Clark*, 402.

CONSUL.

1. The district court has jurisdiction of a suit brought by an alien against the consul of his nation, residing within the district, to recover the amount of official fees improperly exacted. *Lorway v. Lousada*, 77.
2. The act of congress of 3 March, 1817, requires masters of British ships to deposit certain papers with the consul of his government within forty-eight hours of his arrival in a port of the United States. *Ib.*
3. *It seems*, that for receiving these papers, and recording the time of their reception, the consul may charge a fee. *Ib.*
4. There is no such statute requiring the consul to certify to a redelivery of the papers to the master. *Ib.*
5. Foreigners shipped abroad and discharged at their own home in accordance with their contract, need not be discharged before a consul. *United States v. Parsons*, 107.
6. The contents of a consul's certificate of the discharge of a seaman may be proved by parol, if the certificate has been given, though the consul's consent can be proved only by the certificate. *Ib.*

As to discharge of seamen by consuls, see SEAMEN.

CONTRACT.

1. Where the contract between the master and owners of a whaleship was, that if the former should procure four thousand barrels of oil, or a full ship, he should have a lay of one-sixteenth, otherwise a lay of one-seventeenth, and the evidence showed that he brought home a full cargo, and that the ship was well stowed, but that the number of barrels was much less than four thousand, *held*, the master was entitled to the larger lay. *Babcock v. Terry*, 66.

2. Where the master after filling his ship with sea-elephant oil, left behind him at the island where the oil had been obtained some of his ship's company to pursue the business, and the owners afterwards sent out another vessel under another master and brought home the oil made by those men after the former master had left them; *held*, that the former master could not claim a lay in that oil. *Ib.*
3. A contract was made by a shipbuilder to sell a ship he was then building for a certain sum when she should be completed, and the price was to be "in full;" *held*, he could not add to the price the tax provided by the internal revenue act of 1864, notwithstanding section 94 of that act, because the tax was not "imposed" by that statute, but was in fact a diminution of the tax provided by the act of 1863 existing when the contract was made. *See v. Curtis*, 110.
4. The law will imply a promise by an agent to pay his principal money collected for the latter on a contract which was illegal. *Caldwell v. Harding*, 326.

COSTS.

1. Where the master in settling with his crew paid them less than was due, by mistake, and was asked to correct the mistake before action brought, and refused, the crew were given costs, though their suit was found to be in large part ill-grounded. *Hoffman v. Yarrington*, 168.
2. A creditor who successfully prosecutes a petition *in invitum* for adjudication of bankruptcy may tax reasonable counsel fees as part of the costs. *Re Waite*, 321.
3. The fee bill of 1853, 10 Stats. 161, does not interfere with the practice of courts of equity to allow counsel fees as costs in certain cases. *Ib.*
4. Costs can be taxed for only two counsel for the same party. *Ib.*
5. The expense of a short-hand writer cannot be taxed. *Ib.*
6. The court will not usually award costs to the prevailing party on the issue of the bankrupt's discharge. *Re George et al.*, 494.
7. *Semble*, if the objections were frivolous or vexatious, or if, on the other hand, the bankrupt were shown to have the means of paying costs, a different order might be taken in this respect. *Ib.*
8. Effect of a tender. *Carter v. Swift*, 398; *The Walter W. Pharo*, 437.
9. Costs were not given to a bottomry holder against the claimants, though the fund was insufficient. *The Robert L. Lane*, 388.
10. Where the parties had referred a cause to arbitration before the time for filing an answer, and the award was void and the rule was set aside, *held*, the claimant might answer without paying costs. *The Nineveh*, 400.
11. Costs given a seaman whose wages were overdue and had been demanded. *Pedro v. Allen*, 435.
12. The sheriff has no lien for his costs when the attachment is dissolved by the bankruptcy of the defendant, but the assignee may sometimes pay such costs as necessary expenses. *Re Fortune*, 306.

COVENANT.

If there be a covenant to three persons jointly, and a breach, and two die, the survivor may sue alone. *Crocker v. Beal*, 416.

CRIMINAL LAW.

See INDICTMENT.

CRIMINAL PROCEDURE.

See INDICTMENT.

CUSTOMS.

1. Where goods are imported into a port of entry and warehoused there, and are intended to be and are transported to another port, in bond for rewarehousing, the entry is to be completed at the former port, and it is the duty of the collector of that port to have the goods properly examined, and if they are invoiced too low by more than ten per cent, to assess and levy the penal duty. *Spring v. Russell*, 258.
2. The collector of the second port has no authority to levy the penal duty on such goods by virtue of a new appraisement made under his own direction. *Ib.*
3. Articles 460 and 463 of the general regulations of 1857 require a report to the treasury department in such cases, but there appears to be no law or regulation which authorizes a new levy of duties. *Ib.*
4. Nor can the collector at the original port of entry make an addition to the invoice value, upon mere hearsay information derived from the collector at the second port, and without notice to the importér, after the goods have left the first port. *Ib.*
5. At a port where there are no appraisers, a deputy-collector may examine goods entered for warehousing, to ascertain their dutiable value, as well as the collector. *Ib.*
6. By the act of 2 March, 1867, certain foreign wools were, upon their importation, to pay a duty of three cents per pound if their value were twelve cents or less at the last port "whence exported to the United States, excluding charges at such port." Wool of this class cost less than twelve cents per pound in Buenos Ayres, whence it was imported, and was packed in hides which were of precisely the same value as the wool; and the bales were paid for in Buenos Ayres at their gross weight, including the hides, which were an article of value in the market here; *held*, the appraisers ought not to include the hides in their gross estimate of cost, and then to exclude their weight in ascertaining the cost of the wool per pound. *Saxonville Mills v. Russell*, 450.
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3. If seamen ship at Valparaiso, in Chili, for a voyage to Boston, for wages payable in dollars, their wages due at Boston should be reckoned in dollars of the United States. *The Quintero*, 38.
4. In an action by the master of a whaling ship for removing him from command at the beginning of the cruise, the court will give him the probable value of his lay on that cruise. *Parsons v. Terry*, 60.
5. In an action here to recover a certain number of pounds sterling payable in London, it seems, that the measure of damages is the intrinsic value of the pounds measured in our dollars (which the evidence showed to be very nearly \$4.86 to the pound), without regard to the rate of exchange. *Reiser v. Parker, Adm'r*, 262.
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4. If, in such a case, the writ on which the bankrupt is arrested sets out a fraud, so that his certificate of discharge, if obtained, could not be pleaded in bar of the action, he is not entitled to be released from the arrest. *Ib.*
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1. An indictment for distilling without payment of the special tax need not set out the particular acts of distilling, nor the kinds of spirit. *United States v. Fox*, 199.
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6. A charge that the defendant made a still, "to be used for the purpose of distilling," and that the same was removed with the defendant's knowledge and consent "to a district within the said United States, to your jurors unknown, without notifying the collector of the district in which said still was intended to be used" of the requisite particulars, is defective for not alleging affirmatively that the still was intended to be used within the United States, for distilling spirits, that the defendant failed to give the

notice, and that the district in which it was to be used was unknown to the jury. *Ib.*

7. Section 44 of the bankrupt act, punishing bankrupts who, within three months before their petition is filed, dispose of goods otherwise than in the due course of trade, with intent to defraud, does not refer to an intent to defraud only the original seller of the goods thus disposed of. *United States v. Clark*, 402.
8. The crime of fraudulently omitting property or effects from a bankrupt's schedule is complete when the schedule is filed. *Ib.*
9. An indictment for omitting property and effects from the schedule need not allege that the bankrupt took the oath of allegiance prescribed by § 11 of the bankrupt act. *Ib.*
10. Section 23 of the act of 13 July, 1866, 14 Stats. 153, punishing a distiller who shall carry on business without payment of a special tax, is not repealed by section 5 of the act of 31 March, 1868, 15 Stats. 59, which punishes more severely every distiller who shall defraud or attempt to defraud the United States of the tax on the spirits distilled by him, although the minimum punishment under the former law is regulated by the amount of spirits unlawfully distilled. *United States v. Cushman*, 414.
11. In an indictment for a conspiracy to defraud the United States, the subject-matter of the conspiracy is sufficiently described as, "The taxes arising from and imposed by law upon certain divers proof gallons and quantities of distilled spirits, distilled in the United States, then and there situated in certain bonded warehouses," describing the warehouses. The precise kinds, quantities, and qualities of spirits need not be stated, because the description is sufficient to show that the goods were liable to taxes. *United States v. Boyden*, 266.
12. The overt acts need not be laid as having been done "to effect the object" of the conspiracy, it is enough to say that they were done "in pursuance" thereof, which are the usual words in conspiracy. *Ib.*
13. An officer of the revenue may be joined with other persons in such an indictment, without charging him as an officer, notwithstanding such an officer is liable to a greater penalty than other persons. But under such an indictment he can only be sentenced to the lesser punishment. *Ib.*
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16. Nor can he be convicted of opening a letter, before it shall have been delivered to the person to whom it was directed, if he took it in pursuance of his duty as errand-boy, because the delivery to him was a delivery to his employer within the meaning of that clause. *Ib.*
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INFORMER.

1. A deputy-collector of customs who receives a telegram addressed to the collector informing him of a breach of the law by a vessel within his district, and forwards it to the collector, does not thereby become the first informer as against the person who sent the telegram. *Fifty Thousand Cigars*, 22.
2. Nor is the person who carries the telegram and information such informer; nor the officers who seize the goods without making any new discoveries. *Ib.*
3. Information received officially by a deputy-collector is received by the collector. *Ib.*
4. The penalty of a recognizance for the appearance in court of a defendant charged with a crime under the customs act of 1799, is neither a penalty nor a fine recovered by virtue of that act, and when paid into court is not to be distributed under § 91. *United States v. Fanjul*, 117.
5. Under § 179 of the act of 1864, as amended by that of 13th July, 1866, 14 Stats. 145, officers of internal revenue may, in many cases, be informers. *United States v. One Hundred Barrels of Distilled Spirits*, 244.
6. The informer, under that statute, is he who first gives to some officer authorized to act upon it information which leads, in fact, to the seizure and forfeiture. *Ib.*
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1. A decree of the high court of admiralty in England for damages for collision, though satisfied, is not a bar to a suit to recover against an insurer of the injured vessel, when the amount of the decree is proved to be less than the loss actually suffered. *Dunham v. N. E. Mut. Ins. Co.*, 253.
2. Such a decree is absolutely binding on all parties and privies and on the *res* itself; but as between the insurer and the insured can only be invoked to show the amount awarded and paid, and not as evidence of the collision, its causes or its consequences. *Ib.*
3. Wilful or negligent conduct on the part of the insured by which salvage is lost might discharge the underwriter, as fraud certainly would. *Ib.*

4. In such a case the amount recovered from the wrong-doer is to be deducted from the gross amount of the damage, and not from the loss adjusted as a partial loss with a deduction of one-third new for old. *Ib.*
5. A warranty in a policy of insurance that the ship shall not load more than her registered tonnage, means that cargo shall not be carried beyond that amount. *Great Western Ins. Co. v. Thwing*, 444.
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1. To warrant a forfeiture of tools, implements, instruments, or other personal property, under section 48 of the internal revenue act of 1864, 13 Stat. at L. 240, as amended by the act of 1866, 14 id. 111, upon the ground that they are found upon premises where an illicit manufacture is carried on, it should appear that such property was used, or intended to be used in such manufacture, or was in some way connected with it. *United States v. Thirty-three Barrels of Spirits*, 239.
2. A pedler who has duly applied to the assessor for a license in April, is not indictable for carrying on business without payment of the special tax, between the first and seventh days of May, before the tax was, in the usual course of business, assessed upon him for that year, if he intended during that time to pay the tax when it should be assessed, although when the tax-bill was presented him on the twenty-first of May he refused to pay it, having stopped business on the seventh. *United States v. Pressy*, 319.
3. Upon an application by an assessor of internal revenue for an attachment for contempt by a tax-payer, in not producing books and giving evidence concerning his liability to assessment for income, the court has power to issue an order to show cause instead of proceeding *ex parte*, and the defendant has no ground of complaint if such an order is granted. *Re Chadwick*, 439.
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5. The books which the assessor has the right to examine are those of the person whose assessment is in question, and not those of third persons who have had dealings with him. *Ib.*
6. A corporation is not bound to produce its books to the assessor on an inquiry into the income of its shareholders. *Ib.*
7. An insurance company being a stockholder in a bank received a dividend from the bank, three-tenths of which was made out of profits accumulated before the passage of the first act for collecting internal revenue, and seven-tenths from profits acquired afterwards. The bank paid the government tax on the seven-tenths and denied its liability to taxation for the three-tenths, and this liability had never been enforced. *Held*, the three-tenths was capital and not liable to assessment as income under the act of 30th June, 1864, §§ 116, &c., 13 Stats. 281. The seven-tenths having been once assessed to the bank could not be again assessed to the insurance company. *Merch. Ins. Co. v. McCartney*, 447.

8. The assignees of a bankrupt manufacturer selling his goods in the course of their trust in the condition in which they found them, are not bound to pay the tax imposed by the act of 31 March, 1868, on sales by manufacturers. *Re Whipple File Co.*, 477.
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5. *It seems*, that the district court has jurisdiction *in rem* of a suit for personal injuries caused by a collision. *The Willard Saulsbury*, 194.
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7. The circuit and district courts of the United States have jurisdiction of a bill by an assignee in bankruptcy, to redeem a chattel mortgage made in Massachusetts. *Foster et al. v. Ames*, 313.
8. An alien residing in the United States may be adjudged a bankrupt on his own petition. *Re Goodfellow*, 510.
9. Such an alien, owing debts here, may petition as soon as his residence is acquired. *Ib.*
10. Where both parties to a suit pending in a foreign jurisdiction are citizens of Massachusetts, and one of them is a bankrupt, *it seems*, the circuit or district court in Massachusetts may enjoin the creditor from arresting the bankrupt out of the district. *Hazleton v. Valentine*, 270.
11. Though the admiralty has not jurisdiction *in rem* to enforce a mortgage or a State lien upon a ship, it has jurisdiction to pay a fund in court to the persons who hold valid liens on the *res*. *The Island City*, 375.
12. The admiralty will take or refuse jurisdiction of suits between foreigners according to circumstances. *The Becherdass Ambaidass*, 569.
13. The district court has not jurisdiction of a suit at common law or in equity by an assignee in bankruptcy against a third person, excepting in the dis-

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3. Seamen in the whaling service have a lien on the oil for their lays. *The Antelope*, 130.
4. Seamen have a lien on the ship for their wages, though they were hired by the master who was a charterer of the vessel and was to man her. *Flaherty v. Doane*, 148.
5. A lien on freight may be enforced by ordering the freight-money to be paid into court, although it has been attached at common law in a suit still pending. *The Caroline*, 173.
6. By the law of Massachusetts a pilot has a lien, and the district court in admiralty has jurisdiction to enforce it. *The America*, 176.
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8. If it be necessary for libellants to show that the owners of a foreign vessel were not in good credit at the time supplies were furnished, evidence that the vessel was attached for a common-law debt of the owners in a foreign port, and that they did not dissolve the attachment, and that the master, who was a part-owner, was obliged to mortgage his share of the vessel to procure her release, is sufficient proof of a want of credit. *Ib.*
9. If a vessel is attached in a foreign port in a suit at common law against the

- owners, money advanced to pay this debt does not constitute a lien on the vessel, although the owners had no funds, and the master could obtain the release of the vessel in no other way. *Ib.*
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 11. Money advanced to pay a debt which is a lien on the vessel, constitutes a lien. *Ib.*
 12. A stevedore has no lien on a vessel. *Ib.*
 13. The decision in the case of *The Antarctic*, 1 Sprague, 206, as to appropriation of payments, and requiring the creditor to satisfy first all the items for which he has no lien, does not apply to a running account. In such a case the law will appropriate the payments to the items in the order of their dates. *Ib.*
 14. The statute of Massachusetts giving liens on ships for repairs is valid, so far at least as it applies to the refitting and renewing of domestic vessels to adapt them to a new business. *The Island City*, 375.
 15. If the equitable owner of a ship lives in the port where the repairs are furnished, and the dealings are with him as owner, the ship is domestic so far as liens are concerned, though the legal title be in a foreigner. *Ib.*
 16. By the lien law of Massachusetts, Gen. Stats. ch. 151, the liens created under that law are postponed to mariners' wages. *Ib.*
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 19. The ship-keeper of a domestic vessel, which is being repaired for a new use, has not a lien on her for his wages by the general maritime law, as now understood in the United States. *Ib.*
 20. The owner of a vessel incumbered for more than her value and libelled for wages, afterwards appointed a master when there was no prospect of his being able to redeem the vessel. *Held*, the master had no lien for his wages, though by the law of the flag he would have had one under ordinary circumstances. *Ib.*
 21. Seamen engaged in good faith to serve on a ship which is intended to make one or more coasting voyages have a lien on the ship for their wages while the ship is getting ready, though she should never leave the port. *Ib.*
 22. A British vessel was libelled for collision, and her master, who was a part-owner, admitted the liability, and the vessel was sold. The proceeds were insufficient to pay the damage in full. The owners were solvent: *Held*, the seamen's lien on the proceeds would be postponed to that of the libellant in conformity to the rule adopted by the British courts towards our vessels in like circumstances. *The Enterprise*, 455.
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1. The master and co-owner of a whale-ship who has contracted for a cruise of four seasons, and is removed without just cause at the end of the third season has an action against his co-owners for damages. *Parsons v. Terry*, 60.
2. The case of *Hazard v. Howland*, 2 Sprague, 68, followed in the matter of penalty on a master for bringing spirits on board the ship, and permitting them to be used there contrary to the articles. *Babcock v. Terry*, 66.
3. Where the master of a ship gave to another shipmaster, whom he brought home as a passenger, a receipt for \$150 passage-money: *Held*, that he was justly chargeable with the full amount, notwithstanding his testimony that he received only \$75, and gave the receipt for the larger sum "for the benefit" of the passenger, which the court understood to mean that the latter might be able to charge that sum to his owners. *Ib.*
4. The master's bond for safe return of his crew does not require him to return to this country foreigners both shipped and discharged abroad in accordance with their contract though they were not discharged before a consul. *United States v. Parsons*, 107.
5. Where the first mate had been drunk two or three times on board the ship, and on the day the vessel was to go from London to Gravesend in his charge to begin her homeward voyage, got drunk and did not join her till the evening, the master was justified in discharging him. *The El Dorado*, 289.
6. But the master, having lawfully discharged the mate, was not justified in sending him on shore at night, with no responsible companion, when he was incapable of taking care of himself, and there was ample time to dismiss him in the morning; and must account for the mate's clothes that were lost thereby. *Ib.*
7. *It seems*, that a master is not so peculiarly under the protection of the law in respect to his contracts as are the other seamen. *Bourne v. Smith*, 547.
8. Master's lien for freight. *The Eliza's Cargo*, 83.
9. Master's duty and power in choosing a wharf for discharge. *The E. H. Fittler*, 114, and note; *The Boston*, 464.

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2. When officers may be informers. *Fifty Thousand Cigars*, 22; *United States v. One Hundred Barrels, &c.*, 244.

OWNERS.

1. A part-owner of a vessel dissenting from a voyage and receiving a stipulation for her safe return, is not entitled to compensation for her use during the voyage. *The Marengo*, 52.
2. Admiralty has not jurisdiction of an account between part-owners. *Ib.*
3. A court of admiralty has no authority to decree the possession of a ship to her general owners on their libel, alleging that the charterers have failed to fulfil the contract on their part, the charter being one which gave pos-

session and control of the ship to the charterers for a time certain, with no condition of forfeiture on a breach. *The Prometheus*, 491.

4. A court of admiralty may order a ship libelled for wages to be delivered to the general owners, if the charterers who are entitled to possession refuse to claim her. *Ib.*

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1. Dissolution of, may be fraudulent under the bankrupt act. *Re Waite*, 207.
2. Powers and duties of partners who are insolvent in relation to bankruptcy. *Re Fowler*, 161; *Re Waite*, 207; *Re Williams*, 406; *Re Stowers*, 528.
3. Rights of assignee of one partner in respect to joint effects, &c. *Forsyth v. Merritt*, 336.

PASSENGERS' ACT.

1. The fine which is or may be imposed upon the master by way of fine for a violation of section 1 of the act of 3d March, 1855, 10 Stats. 715, is not one of the penalties for which a lien on the vessel is given by section 15. *The Candace*, 126.
2. A mate who is appointed master in a foreign port, and leaves that port with intent to bring certain passengers to the United States, contrary to the act of 3d March, 1855, § 1, is liable to the penalty as a master "taking on board" such passengers, though the contract with them was made by the former master, if the defendant knew the facts and had opportunity to annul the illegal contract before leaving the port. *United States v. Morton*, 179.

PATENT.

1. A preliminary injunction will be ordered in a patent cause only when no new and difficult questions of law or fact are involved in the issue, and no peculiar equities will render its operation harsh or unjust. *Potter v. Whitney*, 87.
2. Effect given to former decisions on the same patent between other parties, and to acquiescence. *Ib.*
3. Wilson's improvement in sewing-machines is not anticipated by Maynard's primer. *Ib.*
4. The general agent of a transportation company, whose duties are confined to making contracts for the conveyance of merchandise by rail between certain points, but without power to say in what cars they should be carried, is not liable for the illegal use by the company on their cars of the plaintiff's patented invention. *Lightner v. Kimball*, 211.
5. Where two railroad companies were consolidated by an act of a State legislature, which vested in the new corporation all the powers, rights, franchises, &c., of the old corporation, the new corporation may lawfully use a patented article which both the old corporations had been licensed to use. *Lightner v. Boston & Albany R.R. Co.*, 338.

PEDLER.

See INTERNAL REVENUE, 2.

PILOT.

1. Pilots' lien may be enforced in admiralty though given by law of State. *The America*, 176.
2. As to duties of pilots, see *American Eagle*, 425.

POST-OFFICE.

An errand-boy who is authorized to take his employer's letters from the post-office is not indictable under the post-office acts for embezzling a letter which he has taken under that authority. *United States v. Driscoll*, 303.

PRACTICE.

1. A fund arising out of a *res* on which seamen have a lien for wages, can be followed in the admiralty. *Flaherty v. Doane*, 148.
2. A consignee was ordered to pay the freight into court to answer liens upon it, notwithstanding he had before been summoned as garnishee in respect to said freight in a court of common law. *The Caroline*, 173.
3. It is not ground for a new trial that one of the jurors was asleep during a part of the trial, if the losing party was aware of the fact at the time. *United States v. Boyden*, 266.
4. Where a submission was made a rule of court under a stipulation that three persons should decide a collision cause, an award which settled the liability but not the damages, was set aside. *The Nineveh*, 400.
5. Practice of admiralty courts in taking or refusing jurisdiction of suits between foreigners. *The Becherdass Ambaidass*, 569.
6. Where a ship has been sold by order of the court, persons who had liens on the ship should proceed by petition and not by libel. *The Island City*, 375.
7. An admiralty court may deliver a ship to the general owner if the special owner who has the right of possession does not claim. *The Prometheus*, 491.

See BANKRUPT LAW and RULES for the practice in bankruptcy.

PRIZE.

1. Cotton picked up at sea by a cruiser of the United States, under circumstances which show that it has recently been abandoned, either by an enemy or by a neutral engaged in breaking the blockade of an enemy's port, is rightly proceeded against as prize rather than derelict. *Seventy-eight Bales of Cotton*, 11.
2. In order that goods should be condemned as prize, it is not necessary that

they should be taken by force, nor from actual hostile possession; it is enough that they have been rightly taken and are the property of an enemy. *Ib.*

3. Coin taken in a vessel which was captured in the act of breaking blockade is liable to condemnation, though belonging to a neutral, and not intended to be used in trade. *The Wando*, 18.
4. Nor will such coin be exempted from this rule by being the property of the neutral master; at least, if his conduct as master and as a witness is open to just animadversion. *Ib.*
5. An amount of money sufficient for the master's necessary expenses, while detained here, will be allowed him out of such coin. *Ib.*
6. It is not sufficient, in order to entitle a vessel to share in the distribution of a prize, that it was within signal distance, and formed part of the force commanded by the officer who made the capture, if its situation was such that it could not have rendered any assistance in the actual conflict in which the prize was taken. *The Selma*, 30.
7. Six miles is the greatest distance at which the day signals of the navy can be seen under ordinary circumstances. *The R. E. Lee*, 36.
8. A prize court has power to award salvage to persons who have taken or preserved a prize, and who are not, strictly speaking, captors. *The Deer*, 95; *The Siren*, 280.
9. Sale by a belligerent of an armed vessel in a neutral port is illegal. *The Georgia*, 96.
10. The prize act of 1864 does not exhaust the subject of prize or no prize. There may still be captures which go to the United States only and not to the captors, and there may be prize without captors. *The Siren*, 280.
11. On the day that Charleston surrendered to our joint forces, but after the surrender, a commissioned cruiser found and took possession of an abandoned merchant vessel, and saved her from imminent loss by fire: held, that neither that cruiser nor the fleet generally were captors, but that the vessel was prize to the United States. *Ib.*
12. The surrender of Charleston operated the capture of all the prize or booty in the town and harbor. *Ib.*
13. Salvage was decreed to the finders of the prize, for putting out the fire. *Ib.*

RENT.

See LANDLORD AND TENANT.

RULES IN BANKRUPTCY.

See APPENDIX, 581.

SALE.

1. Case in which the title to a chattel was held to pass by estoppel. *Ex parte Rockford, &c., R.R.*, 345.
2. *It seems*, that in Massachusetts a purchase of goods with intent on the part of

the buyer not to pay for them, is voidable by the seller. *Parker v. Byrnes*, 539.

3. When the right of stoppage *in transitu* ends in respect to goods in warehouse. *Ib.*
4. *It seems*, that a factor may set off a debt due him from the bankrupt under the clause concerning mutual credit, though he had no lien as factor. *Ex parte Caylus*, 550.
5. Where a vendee of goods had consigned them for sale to his unpaid vendor upon terms which implied a lien, the vendor has a lien as against the assignee of the vendee in bankruptcy. *Ib.*

SALVAGE.

1. Where the value of a derelict is small, less than that of saving it, and the owner is informed of the proceedings and does not claim, the whole net proceeds may be decreed to the salvors. *The Zealand*, 1.
2. Salvors of a derelict vessel have the right to retain possession until the salvage service is completed. *The Ida L. Howard*, 2.
3. But if their own means are inadequate they are bound to accept additional assistance, if offered. *Ib.*
4. If, in such case, a steamer furnished by underwriters is offered the salvors free of charge, they cannot found a claim to increased compensation upon their acceptance and use of the steamer. *Ib.*
5. The use and consumption by salvors, in the course of their service, and for their necessary subsistence, of stores found on board a derelict, is proper, although they could have brought stores of their own on board without great inconvenience. *Ib.*
6. Salvage of derelict property is compensated by similar rules as obtain in respect to property not derelict. If the abandoned vessel lies in or near a frequented harbor, the chief ground of enhancement of salvage by reason of her being derelict is that the finders have all the responsibility of the enterprise without aid from the master. *Ib.*; *The Georgiana*, 91.
7. Where five distinct sets of salvors took part in stripping and unloading a stranded vessel, they have not separate liens on the several articles saved by each set, but all are entitled to be paid out of all the property saved. *The Albion Lincoln*, 71; *The Ottawa*, 274.
8. The award to each set of salvors who strip and discharge a wrecked vessel does not depend upon the value of the goods which each actually saved. *Ib.*
9. The value of the property saved is usually estimated at the first port of safety; but where the salvors refused to deliver the property to the owners, and neglected to bring their libels until after the goods had fallen in market value; *held*, that the price was to be ascertained when the libels were filed and the warrants to deliver executed. *The Albion Lincoln*, 71.
10. A vessel driven on shore in a harbor during a gale of wind, set her colors union down, and was pulled off shore and towed to her dock by a tug. *Held*, a salvage service. *The M. B. Stedson*, 119.
11. Salvage is the saving of property from extraordinary sea peril by persons

- who are under no legal obligation to render the service. *The M. B. Stedson*, 119; *The Coringa*, 154.
12. The lays of seamen in the whaling service contribute to salvage. *The Antelope*, 130.
 13. After a disabled vessel has been taken to and left in a port of safety, towage afterwards to a port for repairs is not part of the salvage service. *The W. F. Garrison*, 139.
 14. The mate of the salvors' vessel was given the share of a seaman only as he refused to undertake the salvage service. *The Lovett Peacock*, 143.
 15. To reduce the compensation for a salvage service to a mere payment for work and labor, an obligation must be shown arising out of some binding contract or duty not to claim the larger reward. *The Coringa*, 154.
 16. The facts that a steamer is owned by underwriters, and is usually employed for prices agreed beforehand, and that her officers and crew are paid by the month in full for all services, do not raise an implication that salvage compensation was waived when she saved a vessel not underwritten by the owners of the steamer and without any express contract. *Ib.*
 17. A steamer was engaged to go to a vessel in distress with the understanding that her time and services should be liberally paid for if her services were accepted and were successful; *held*, an agreement for salvage. *Ib.*
 18. It is a general rule in salvage that all persons who give any personal assistance in saving the property are salvors. Another general rule is, that the ship, cargo, freight, &c., saved make one fund or subject of salvage. *The Ottawa*, 274.
 19. The keeper of a light-house is under no obligation to render salvage services gratuitously. *Ib.*
 20. A person whose oxen are used in a salvage service does not thereby become a salvor. Owners of vessels whose crews perform salvage service share the salvage compensation, not because their vessels are used, but as an encouragement to permit their use or the use of the men. *Ib.*
 21. The crew can be salvors of their own vessel when their contract has been put an end to, either voluntarily by the master, or as the effect of a *vis major*. *The Olive Branch*, 286.
 22. But where the crew were abandoned by the master, near the home port, and the vessel was soon afterwards stranded, and there was no mate, and the men got the ship off the shore and saved her with considerable difficulty and danger, *held*, they were not salvors. *Ib.*
 23. A schooner laden with coal stranded upon the rocks and in a dangerous situation was got off and saved by salvors from the shore at their own risk and responsibility, while the crew were dismantling her by orders of the captain preparatory to abandoning her as a total loss. *Held*, that the salvors were entitled to a more liberal compensation than in many other cases where the property saved was of a greater value; and that their merit was not diminished but increased by the fact of the incompetency and perhaps bad faith of the captain. *The Annie Leland*, 310.
 24. The master and steward had been guilty of embezzling from the derelict; those libellants not concerned in the fraud were awarded the same shares that they would have had in the absence of any embezzlement. *The L. T. Knights*, 396.

25. A boy who had taken small articles "as keepsakes" only, was awarded a less sum in consequence. *Ib.*
26. Salvage not due when the salvor has resisted the title of the owner. *Bartlett v. Budd*, 223.

SALVAGE IN PRIZE CASES.

The Deer, 95; *The Siren*, 280.

WHEN SEAMEN MAY BE SALVORS OF THEIR OWN SHIP.

The Antelope, 130; *The Olive Branch*, 286.

AMOUNTS AWARDED.

The Zealand, 1; *The Ida L. Howard*, 2; *The Albion Lincoln*, 71; *The Georgiana*, 91; *The Deer*, 95; *The M. B. Stetson*, 119; *The W. F. Garrison*, 139; *The Lovett Peacock*, 143; *The Coringa*, 154; *The George Gilchrist*, 234; *The Annie Leland*, 310; *The L. T. Knights*, 396.

DISTRIBUTION AMONG SALVORS.

The Georgiana, 91; *The Lovett Peacock*, 143; *The Coringa*, 154.

SALVAGE DEFINED.

The M. B. Stetson, 119; *The Coringa*, 154.

SEAMEN.

1. Where seamen shipped at Valparaiso on board a Chilian vessel for a voyage to Boston and back to Valparaiso, they cannot by parol evidence vary the voyage shown in the articles if the contract in this respect was fully explained to them before they signed it. *The Quintero*, 38.
2. But they can avoid a clause in the articles which was not clearly explained to them, and was unusual. *Ib.*
3. Where, in such a case, the seamen left the vessel on her arrival in Boston, under a claim of right, and in ignorance of the penal clause of the articles, and upon being informed of it, offered to come on board and serve again, but were refused permission, and their absence had worked no injury to the owners, *held*, they might recover their full wages. *Ib.*
4. Where a son of the master of a ship acted as able seaman on the return voyage, knowing that the ship was fully manned without him, wages were refused him. *The Robert Noble*, 57.
5. When the ship has not the means to cure a seaman who is taken ill on a whaling voyage, and he is cared for on shore, the reasonable expenses of his care and cure are chargeable to the ship. *Babcock v. Terry*, 66.
6. As to foreign seamen shipped abroad, see *United States v. Parsons*, 107; *The Hermon*, 515.
7. When a vessel has been condemned and sold abroad as unfit for service, and it is proved that she had met with some sea peril, and nothing more is shown, the crew are not entitled to two months' extra wages on being discharged at the foreign port, nor to the cost of their return home. *Hoffman v. Yarrington*, 168.
8. Whether the crew could recover extra wages by proving that the vessel had

- been sent to sea improperly provided or had become unseaworthy from decay which might have been foreseen? *Ib.*
9. If a substantial deviation is made from the voyage, and one that is injurious to the seaman, he may lawfully leave the ship at any port where a substitute can be obtained. *The Gem*, 180.
 10. A local usage to require the men to stay by a fishing vessel till she is unloaded and cleaned, in her turn, will not authorize the owners to claim a deduction from the wages of the men who have not assisted in this work, if they were not asked to stay for this purpose, and the usage was merely made use of to cheapen their demand for wages. *The Olive Branch*, 286.
 11. Discharge of a mate for drunkenness. *The El Dorado*, 289.
 12. Seamen have a lien on the ship for wages though they have been hired by the master, who was to man the vessel on his own account. *Flaherty v. Doane*, 148.
 13. A seaman who was shipped as cook on a foreign voyage, and who performed extra services as stevedore in a foreign port, may proceed in the admiralty for compensation for the extra services, though his wages as cook have been paid in full. *The Charles F. Perry*, 475.
 14. If a vessel has not on board the amount of bread required to be carried, and the crew are put on short allowance, they may recover extra wages though the immediate cause of deficiency was a sea peril. *The Hermon*, 515.
 15. What is full allowance, and what may be substituted for bread. *Ib.*
 16. The lays of seamen in the whaling service contribute to salvage. *The Antelope*, 130.
 17. Concerning the discharge of seamen abroad, see *United States v. Parsons*, 107; *Hoffman v. Yarrington*, 168; *Rogers v. Lewis*, 297; *Pedro v. Allen*, 435; *The Hermon*, 515.
 18. A settlement deliberately made by a seaman with the advice of his proctor will not be opened. *The Hermon*, 515.

See CONSUL; MASTER; SHIPPING ARTICLES; USAGE.

SHIPPING ARTICLES.

1. As a general rule, independently of statute, seamen cannot vary the voyage described in the articles by parol evidence, if the contract was fully explained to them. *The Quintero*, 38.
2. But they can avoid any unusual or oppressive clause not so explained, as for instance, one which forfeits their wages for a certain time for forty-eight hours without leave. *Ib.*
3. Articles forbidding the use of spirits or tobacco will not be broken by carrying wine or spirits on them on a voyage. *Parsons v. United States*, 107.
4. If the length of a whaling voyage is not specified in the articles, they will not be void. *The Antelope*, 130.
5. Whether a usage of trade can vary the shipping articles, *quære?* *T*
6. A defect in the articles binding a seaman to a ship for a long time to the disadvantage of only by *Franklin*, 191.

7. A mate was shipped for a whaling voyage of three years at a certain lay and a "bonus" of two hundred dollars, paid him at the time of shipment, and receipted for as a bonus "to perform the voyage." He served faithfully for fourteen months, and was then discharged with the master's consent upon terms satisfactory to both, one of which was that he should have his lay up, to the time of his discharge. *Held*, the owners could not deduct from the mate's lay a proportionate part of the bonus as a set-off or recoupment, on the ground that he had not performed the voyage. *Pedro v. Allen*, 435.

STEAMBOAT.

Powers of supervising inspectors of steamboats to make rules for vessels passing each other. *The Forest City*, 425.

SUNDAY.

The statute of Massachusetts, prohibiting work on the Lord's day, does not affect a claim for damages arising in the harbor of Boston by collision. *Sawyer v. Oakman*, 134.

TAX.

See INTERNAL REVENUE, 2-7; CONTRACT, 3.

TENDER.

See COSTS, 8; BANKRUPT LAW; ACTS, &c., 15.

TRADER.

Who are traders and tradesmen under the bankrupt act, §§ 29, 39. *Re Keach*, 335; *Re Rogers*, 423; *Re Chandler*, 478.

USAGE.

1. How far usage can be invoked in aid of shipping articles, *quære?* *The Gem*, 180.
2. Whether a usage that the finder of a dead whale should own it unless reclaimed by its former owner before it is cut in would be valid, *quære?* *Bartlett v. Budd*, 223.
3. Whether a local usage that seamen shall wait for their wages until the owners of a fishing vessel are ready to have her fully discharged and cleaned is valid, *quære?* *The Olive Branch*, 286.
4. A local usage for the master of a whale-ship to wait for his lay until the owners may choose to sell the oil is void. *Bourne v. Smith*, 547.

WHALING VOYAGES.

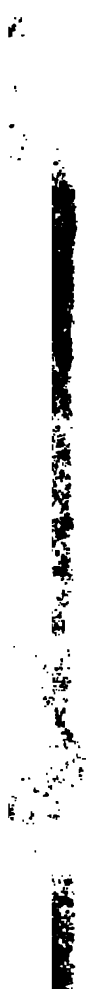
1. Seamen in the whaling service have a lien on the oil for their wages. *The Antelope*, 130.

2. The lays of such seamen contribute to salvage. *Ib.*
3. Part of the proceeds of a whaling voyage were received in gold and part in currency, and some advances were made to the libellant in gold. The account of the voyage was made up wholly in currency, the owners allowing and charging the premium on gold. *Held*, it was properly made up. *Carter v. Swift*, 398.
4. The libellant was to have a lay of one forty-second part of the catchings. If the account was so made up that he received this share, it was rightly made up, whether in one currency or another. *Ib.*
5. Damages to a master who has been unlawfully removed from command of a whale-ship. *Parsons v. Terry*, 60.
6. Construction of articles in whaling voyages. *Ib.*; *Babcock v. Terry*, 66; *Pedro v. Allen*, 435.
7. Settlements of whaling voyages, and what are legal charges by the owners and master. *Ib.*
8. The master cannot be charged with a loss by bad debts in the sale of the oil. *Bourne v. Smith*, 547.

See USAGE, 2, 3, 4; DAMAGES, 1, 2, 4.

WILL.

1. A husband had covenanted with trustees for his wife that she might receive and dispose of all property that should come to her by descent or devise, and broke the covenant by himself receiving and disposing of a considerable sum so derived. By his will, he created a trust fund for his children, and provided that his trustees might under certain circumstances, pay his wife a part of the income. Whether this provision was intended as a satisfaction of the debt due for breach of the covenant, *quære?* *Crocker v. Beal*, 416.
2. If so intended, the fact that the wife had, soon after the husband's death, accepted a small payment of income, she having afterwards refused all others, did not prove a conclusive election on her part to accept the will. *Ib.*



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